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Title: Alex Ngiraingas, et al., Petitioners
v.
Francisco Q. Sanchez, etc., et al.

Docketed:
December 27, 1988

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Siegel,Jeffrey R.

Counsel for respondent: Mason,John Patrick

Entry	Date	Note	Proceedings and Orders
1	Dec 27 1988	G	Petition for writ of certiorari filed.
2	Jan 20 1989		Brief of respondents Francisco Q. Sanchez, et al. in opposition filed.
3	Feb 15 1989		DISTRIBUTED. March 3, 1989
4	Feb 17 1989	X	Reply brief of petitioners Alex Ngiraingas, et al. filed.
5	Mar 6 1989	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States. Justice Kennedy OUT.
6	Jul 28 1989		Brief amicus curiae of United States filed.
7	Aug 2 1989		REDISTRIBUTED. September 25, 1989
8	Sep 7 1989	X	Reply brief of petitioners Alex Ngiraingas, et al. filed.
9	Oct 2 1989		Petition GRANTED. Justice Kennedy OUT.
			**********
10	Nov 15 1989		Joint appendix filed.
11	Nov 15 1989		Brief of petitioners Alex Ngiraingas, et al. filed.
12	Nov 27 1989		SET FOR ARGUMENT MONDAY, JANUARY 8, 1990. (4TH CASE)
13	Dec 5 1989		CIRCULATED.
14	Dec 5 1989	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
15	Dec 11 1989		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Kennedy OUT.
16	Dec 11 1989		Record filed.
		*	Certified copy of C. A. Proceedings received.
17	Dec 15 1989	X	Brief amicus curiae of Virgin Islands filed.
18	Dec 18 1989		Record filed.
		*	one vol., Distrit Court of Guam
19	Dec 19 1989	X	Brief amicus curiae of United States filed.
20	Dec 20 1989	X	Brief amicus curiae of Commonwealth of the Northern Mariana Islands filed.
21	Dec 20 1989	X	Brief of respondents Francisco Q. Sanchez, et al. filed.
22	Jan 8 1990		ARGUED.

PETITION FOR WRIT OF CERTIORARI

88-1281

Supreme Court, U.S.
FILED
DEC 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

Case No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ALEX NGIRAINGAS, OSCAR ONGKLUNGEL, JIMMY MOSES, ARTHUR MECHOL, JONAS NGEHEED and BOLANDIS NGIRAINGAS,

Petitioners,

VS.

FRANCISCO Q. SANCHEZ, individually and as a Police Officer, JOSEPH R. CRUZ, individually and as a Police Officer, JOSE T. TERLAJE, individually and as a Police Officer, JOE P. BALAJADIA, individually and as a Police Officer, ELMER F. SARDOMA, individually and as a Police Officer, JOSEPH A. SAN NICOLAS, individually and as a Police Officer, JUDITH P. GUTHERTZ, in her Official Capacity as Director of the Department of Public Safety (Guam Police Department), THE GUAM POLICE DEPARTMENT and THE GOVERNMENT OF GUAM,

Respondents,

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT,

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. Whether the unincorporated Territory of Guam is a "person" for the purpose of 42 USC Section 1983?

2. Whether officers of the Government of Guam are liable in their official capacities for deprivations of Civil Rights in violation of 42 USC Section 1983?

LIST OF ALL PARTIES TO THE PROCEEDING FOR WHICH JUDGMENT IS SOUGHT TO BE REVIEWED.

Plaintiffs-Petitioners

1. Alex Ngiraingas
2. Oscar Ongklungel
3. Jimmy Moses
4. Arthur Mechol
5. Jonas Ngeheed
6. Bolandis Ngiraingas

Defendants-Respondents

7. Francisco Q. Sanchez
8. Joseph R. Cruz
9. Jose T. Terlaje
10. Joe P. Balajadia
11. Elmer F. Sardoma
12. Joseph A. San Nicolas
13. Judith P. Guthertz
14. The Guam Police Department
15. The Government of Guam

Amicus Curae

16. United States

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Appendix:

A. Memorandum Order, District Court of Guam, (filed on October 30, 1986)

B. Judgment, District Court of Guam, (filed on October 30, 1986)

C. Opinion of the United States Court of Appeals for the Ninth Circuit (filed June 7, 1988)

D. Order And Amended Opinion of the United States Court of Appeals for the Ninth Circuit (filed June 7, 1988, amended September 28, 1988)

TABLE OF AUTHORITIES

Cases

Alabama v. Pugh, 438 US 781, 57 L.Ed.2d 1114, 98 S.Ct. 3057 (1978)

Attorney General of Guam v. United States, 738 F.2d 1017 (9th Cir. 1984)

Barusch v. Calvo, 685 F.2d 1199, (9th Cir. 1982)

Bunyon, 770 F.2d 773 (9th Cir. 1985), cert. den. 477 US 903 (1986)

Carter v. District of Columbia, 795 F.2d 116 (D.C. Cir. 1986)

Commonwealth of Northern Mariana Islands v. Atalig, 723 F.2d 682, 684 (9th Cir.) cert. den. 467 US 1244 (1984)

District of Columbia v. Carter, 410 US 958, 93 S.Ct. 1411, (1973)

Edelman v. Jordan, 415 US 651 L.Ed.2d 662, 94 S.Ct. 1347 (1974)

Ex Parte Young, 209 US 123, 52 L.Ed. 714, 28 S.Ct. 441 (1908)

Fleming v. Department of Public Safety, 837 F.2d 401 (9th Cir. 1988)

Gromer v. Standard Dredging Company, 224 US 362 (1912)

Harris v. Boreham, 233 F.2d 110 (3rd Cir. 1956)

Hutto v. Finney, 437 US 678, 57 L.Ed.2d 522, 98 S.Ct. 2565 (1978)

Imbler v. Pachtman, 424 US 404, 417, 47 L.Ed.2d 124, 96 S.Ct. 984 (1976)

Leibowitz, the Applicability of Federal Law to Guam 16 Va. J. Int'l 2125 (1975)

Milliken v. Bradley, 433 US 267, 53 L.Ed.2d 745, 97 S.Ct. 2749 (1977)

Mitchum v. Foster, 407 US 225, 32 L.Ed.2d 705, 92 S.Ct. 2151 (1972)

Monell v. New York City Department of Social Services, 436 US 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978)

Monroe v. Pape, 365 US 167, 5 L.Ed.2d 492, 81 S.Ct. 473 (1961)

Ngiraingas v. Sanchez, Amended Slip Opinion and Order, filed June 7, 1988, Amended on September 28, 1988

Ocasio v. Bryan, 374 F.2d 11 (3rd Cir. 1967)

Owen v. City of Independence, 445 US 622, 63 L.Ed.2d 763, 100 S.Ct. 1398 (1980)

Palmore v. United States, 411 US 386, 397, 93 S.Ct. 1670, 1676 (1973)

Penhurst State School and Hospital v. Halderman, 465 US 89, (1984)

Procunier v. Navarett, 434 US 555 (1978)

Quern v. Jordan, 440 US 332, 59 L.Ed.2d 358, 99 S.Ct. 1139 (1979)

Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285, (9th Cir. 1985), cert den. 475 US 1081 (1986)

Scheuer v. Rhodes, 416 US 232, 40 L.Ed.2d 90, 94 S.Ct. 1683, 71 Oh. Ops. 2d 474 (1974)

United States v. Covington, 783 F.2d 1052, 1055 (9th Cir. 1985) cert. den. 107 S.Ct. 117 (1986)

United States v. Wheeler, 435 US 313, 320-321 (1978)

Statutes

28 USC 1254

42 USC 1981

42 USC 1983

42 USC 1985

42 USC 1986

48 USC 1421(b)(u)

48 USC 1421 through 1428(e) 1987

48 USC 1423(i)

OPINIONS DELIVERED BELOW

The District Court of the Territory of Guam issued a Memorandum Order on October 30, 1986, and entered judgment on that date. (See Appendix). It was not reported. The United States Court of Appeals For the Ninth Circuit filed an Opinion on June 7, 1988, Case #86-2840. (See Appendix). The Opinion was amended and Petition for Re-hearing denied in Order and Amended Opinion filed September 28, 1988. (See Appendix).

JURISDICTION

Opinion was filed by the United States Court of Appeals for the Ninth Circuit on June 7, 1988. Petition for Re-hearing with Suggestion for Re-hearing En Banc was filed by placing the

Petition in the mail on June 22, 1988. On September 28, 1988, the United States Court of Appeals for the Ninth Circuit issued and filed the Order and Amended Opinion, which denied the Petition for Re-hearing. Jurisdiction is vested in this Court pursuant to 28 USC Section 1254.

STATUTES INVOLVED

The statute to be interpreted by this Court is 42 USC Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On March 31, 1983, the five Plaintiffs, all Palauan, were arrested by the individual Defendants, all of whom are Guam Police Officers, with the exception of Judith P. Guthertz, who was the Director of the Department of Public Safety, which subsequently became the Guam Police Department. The Plaintiffs were transported to Pedro's Plaza in Agana, Guam, which serves as Narcotics Headquarters. During interrogation of the Plaintiffs, the police officers asked each to execute a "Rights Waiver Form." When various of the Plaintiffs refused to sign it, they were asked to write a statement implicating themselves in the crime which was the subject of the arrest, which was suspicion of possession of marijuana. The Plaintiffs

were then harassed and assaulted and forced to sign self-implicating statements.

The assaults were particularly brutal. For instance, Plaintiff Jonas Ngeheed was taken into the rest room by Officers Francisco Q. Sanchez and Joseph San Nicolas where he was knocked to the floor. While still on the floor, San Nicolas kicked and punched him, picked him up, put him against the wall and continued to punch him on the body. Plaintiff fell for a second time and both Sanchez and San Nicolas continued kicking him. Another unidentified police officer slammed Ngeheed's head into the concrete wall. As a result, Ngeheed wrote the statement the police officers requested. Jimmy Moses was also taken into the rest room and

assaulted. He was also forced to execute the Rights Waiver Form. All Plaintiffs alleged similar acts of brutality or threats.

On September 24, 1985, the Plaintiffs filed this action in the District Court of Guam, Case #85-0064. The Third Amended Complaint filed June 4, 1986 states causes of action for deprivations of Civil Rights in violation of 42 USC Section 1981, 1983, 1985 and 1986, based on police brutality motivated by discriminatory animus. The Complaint also alleged a de facto policy in the use of excessive force in inducing arrestees to obey lawful and unlawful police orders, which included requiring involuntary confessions.

On August 18, 1986, the Government of Guam and Guam Police Department,

Defendants Terlaje, Balajadia, Sardoma and Guthertz moved the District Court to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b) and for Summary Judgment pursuant to Federal Rule of Civil Procedure 56. The basis of the Motion was "that the Government of Guam, the Guam Police Department and the individuals, as Defendants in their official capacity, are immune from Plaintiffs claim under 42 USC Section 1981, 1983, 1985 and 1986; the claims against the persons being sued in their individual capacities are barred by the statute of limitations; and the Superior Court of Guam is the proper forum for Plaintiffs to bring their tort claims." The statute of limitations was only raised as a defense against the individual

Defendants, not against the Government of Guam.

Plaintiffs filed a timely Opposition to Motion to Dismiss and Motion for Summary Judgment on September 5, 1986 with the Statement of Genuine Issues and Declaration of Jeffrey R. Siegel. The Motion was submitted at the hearing on September 24, 1985, and the Memorandum Order and Judgment in favor of all Defendants was entered on October 30, 1986. (See Appendix). Timely Notice of Appeal to the United States Court of Appeals For the Ninth Circuit was filed on November 3, 1986. The case was briefed and argued and submitted on February 23, 1988 in Pasadena, California. The Opinion was filed on June 7, 198 in the United States Court of Appeals for the Ninth Circuit, Case

#86-2840. The Opinion affirmed in part and remanded in part. The United States Court of Appeals for the Ninth Circuit held that the Government of Guam was not a person for the purpose of Section 1983, and neither were the police officers acting in their official capacities. The Ninth Circuit Court of Appeals also reversed, concluding that the Civil Rights claims against the officers in their individual capacities were timely filed. (See Appendix).

The Petitioners filed a Petition for Re-hearing and Suggestion for Re-hearing En Banc on June 22, 1988, which was denied in the Order and Amended Opinion filed by the United States Court of Appeals for the Ninth Circuit on September 28, 1988. (See Appendix).

REASONS FOR ALLOWING THE WRIT

The Petitioners request that this Court grant Certiorari because the Decision of the United States Court of Appeals for the Ninth Circuit is inconsistent with its decision interpreting the status of the Commonwealth of the Northern Marianas Islands in Fleming v. Department of Public Safety, 837 F.2d 401 (9th Cir 1988), and from the District of Columbia Circuit's treatment of the District of Columbia, which is Constitutionally similar to the unincorporated Territory of Guam in Carter v. District of Columbia, 795 F.2d 116 (D.C. Cir. 1986), and from the Third Circuit's treatment of the Unincorporated Territory of the Virgin Islands.

Moreover, this case squarely presents an important issue of Federal law which should be settled by the Supreme Court. Guam is a developing area with characteristics of both an American style democracy and a third world developing nation. It presents the classic challenges which have faced all American frontiers. Applying the rule of law in Guam and restraining law enforcement conduct on the local level are necessary for the protection of a population which contains elements of an underdeveloped society. There are many people on Guam who do not yet understand the legal or political systems or how to protect themselves against their abuses. The Territory of Guam has never voted to become part of the United States and consequently has been the subject of a

governmental system which in many important respects clashes with traditional Island culture.

Title 42 USC Section 1983 expressly recognizes that acts taken under color of "territorial law" are within its scope. In 1871 when the Act was passed, much of the continental United States was unincorporated territory. Guam is becoming a cultural, educational, medical and travel center for the Western Pacific rim and its island neighbors, such as Micronesia. Effective protection of Civil Rights and liberties are becoming critical, especially in view of technological advances which can make police abuse and invasion of privacy, especially on a small island, overwhelming. The pressure which these forces exert on the

local culture, and the relative disparities in wealth and power have heightened the importance of providing protection for Civil Rights.

Police brutality has long been a problem on Guam, and continues to be so. Police officers determined to have been engaged in such conduct, in the rare instances when an investigation is thoroughly performed, are subject to inconsistent discipline, if disciplined at all. Moreover, the relatively recent introduction of self government over local functions has not provided adequate time for the society and authorities to adjust to their new responsibilities. Consequently, police training is inadequate and the philosophy of law enforcement in a democratic society has not yet been

ingrained to a degree sufficient to restrain abuses. For these reasons an effective remedy, which can only be afforded through federal law since the local legislature has been indisposed to secure these liberties, is required. Furthermore, the remedy is required to restrain the only non-federal governmental entity on the island.

Guam has never exercised self-determination and the people here are subject to laws and administration over which they have no vote in Congress. Social Security taxes are withheld from salaries, with no voting representation in the taxing authority, i.e. the United States Congress. The historical parallel is apparent -- the American colonies separated from England largely because it imposed taxes without the

representation of the taxed. Separation is impractical for Guam, and indeed, few desire it. However, the frictions and resentment which grow in all human souls as a result of non-democratic institutions grow here as well. The people of the world have become more aware of their liberty, and human rights is a benchmark of development and civilization. Private remedies for Civil Rights are the only effective means of acquisition and preservation of liberties, especially when the Government is the depriving agent. It is for these philosophical and democratic reasons that this case presents such important issues for the people of Guam, as well as the other areas of the United States which are not states, such as the Commonwealth of

Puerto Rico, the Unincorporated Territory of the Virgin Islands, and the Commonwealth of the Northern Mariana Islands. The Supreme Court can substantially clarify the standing of these areas, as well as the meaning of Section 1983 with respect to states with a careful discussion of the policies behind Section 1983 presented in this case.

ARGUMENT

THE GOVERNMENT OF GUAM IS A PERSON FOR THE PURPOSE OF 42 USC 1983.

42 USC Section 1983 provides:

> Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any state, territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

> injured in an action at law, suit in equity, or other proper proceeding for redress.

The watershed case with respect to whether an entity is a "person" subject to liability under 42 USC Section 1983 is Monell v. New York City Department of Social Services, 436 US 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978). In Monell, the City of New York Department of Social Services and Board of Education compelled pregnant women to take unpaid leaves of absence prior to the time such leaves were required for medical reasons. 436 US at p.661. The Court first explored the question of whether Congress considered itself empowered to "consistent with the Constitution, obligate municipal corporations to keep the peace if those corporations were neither so obligated nor so authorized

by their state charters." 436 US at p.668. The Supreme Court concluded that "the Constitutional objections raised...would not have prohibited Congressional creation of a civil remedy against state municipal corporations that infringe Civil Rights." 436 US at p.669.

This Court then turned to the question of whether Congress intended to include municipal corporations within the term "persons" as used in Section 1983. Much of the argument against the extension of federal power to localities (but not directly against states themselves) was based on principles of Federalism in the floor debates of the 42nd Congress. The independence of states and their subdivisions was to be balanced against the results of the

Civil War and the subsequent activities of the Ku Klux Klan. See, Mitchum v. Foster, 407 US 225, 32 L.Ed.2d 705, 92 S.Ct. 2151 (1972). If the Civil War -- and its definitive statement on federal power -- were to be given any meaning, and the liberty of newly freed slaves was not to be substituted for tyranny inflicted by subdivisions of states, it had to be firmly established that the Fourteenth Amendment authorized the federal government to impose the provisions of the Constitution within the states, and that Section Five of the Fourteenth Amendment, i.e. the Enabling Clause, permitted legislation such as the Civil Rights Act. Quern v. Jordan, 440 US 332, 59 L.Ed.2d. 358, 99 S.Ct. 1139 (1979), concurrence of Brennan, J. 440 US at p.354.

The debates focused on entities within states, but the results of the debates were broader, and the interpretation of Section 1983 in Monell reflects this. The Dictionary Act which had been passed only months prior to the Civil Rights Act, defined the word "person" as follows:

> In all acts hereafter passed...the word 'person' may extend and be applied to bodies politic and corporate...unless the context shows that such words were intended to be used in a more limited sense. Act of February 25, 1971, Section 2, 16 Stat. 431, Monell, 436 US at p.688.

The contours of the applicability of Section 1983 are defined by "bodies politic and corporate." Monell, Supra, 436 US at p.688.

It is in this analysis that the Ninth Circuit takes a different view than the Third Circuit. In the Order

and Amended Opinion in this case below, the Ninth Circuit states:

> As a creature of the Federal government, Guam stands in sharp contrast to 'bodies politic' as that phrase is normally understood. See, Leibowitz, 16 Va. J. Int'l L. at 35 ('The Government of Guam totally lacks the degree of local autonomy possessed by states or commonwealths within the federal system'). Unlike states, Guam has no sovereign status; it cannot create a system of laws and administration except by leave of Congress and, of course, the Constitution does not accord Guam or any other unincorporated territories independent sovereignty. See e.g. 48 USC 1423(i) (Congress may annul any act of Guam legislature); compare U.S. Constitution Amendments X-XI with Id. at Art. IV, Section Three. It is also not like a trust territory whose relationship with the United States Government is a Commonwealth or a "free associate" administered by the United States pursuant to a trusteeship agreement or covenant." Slip Opinion at p.12200.

The thrust of these comments is, that because Guam is subject to the

plenary power of Congress, it is not a body politic and therefore not a "person" under Section 1983. The first anomaly which is apparent is drawn from the face of 42 USC Section 1983. The federal government is not a "person" under Section 1983 most clearly because acts taken under color of federal law are not included within the scope of the statute. However, acts taken under color of territorial law are expressly included in this statute. It is logical that Congress did not intend the Federal government to be included under Section 1983 because the evil it was designed to protect against, discrimination against the newly freed slaves, was being effected by local officials, not federal officials. This analysis is definitive upon one point: that Congress, in

enacting 42 USC Section 1983 intended to treat the federal government, or at least federal officials, differently than it intended to treat territorial governments, or territorial officials.

Second, the Unincorporated Territory of the Virgin Islands has been recognized by the Third Circuit to be a "body politic." In Harris v. Boreham, 233 F.2d 110 (3rd Cir. 1956), the plaintiff slipped and fell on the Island of St. Thomas in the Virgin Islands, an Unincorporated Territory. The plaintiff sued St. Thomas, a municipality of the territory. The action was dismissed on the ground of sovereign immunity. Subsequently, the plaintiff brought a federal tort claim against the United States on the theory that the streets of St. Thomas are the property of the

United States and that Boreham, Superintendent of Public Works, was an employee of the United States. The Court noted that Congress had sovereignty over the territories and that it may legislate as a state legislature may legislate a state. Harris v. Boreham, 233 F.2d at p.113. However, Congress created the territorial government for the unincorporated territory and has conferred sovereignty and autonomy to it. The Opinion indicates that a territory is a body politic with attributes of sovereignty, and may administer and govern the territory.

> The territory of the Virgin Islands was a body politic quite distinct from the government of the United States and that it has attributes of sovereignty which have been delegated to it by the government of the United States but which are distinct from the

powers of that government. 233 F.2d at p.114.

Therefore, the immunity of the federal government was held not to apply to the territorial government.

However, in Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285, (9th Cir. 1985), cert. den. 475 US 1081 (1986), the Ninth Circuit stated:

> Guam's relationship to the federal government is different from Boulder's relationship to Colorado. As we have seen, the Government of Guam is an instrumentality of the federal government over which the federal government exercises plenary control. Congress has granted it far fewer powers of self government than the State of Colorado has granted the City of Boulder. There is no reason why Guam should enjoy less immunity than the federal government itself. (Citation). 764 F.2d at p.1289.

But why should the fact that Congress has plenary control pursuant to the Constitution be employed to

effectively deny the sovereignty and autonomy which Congress has granted Guam pursuant to the Organic Act, 48 USC Section 1421? There is no reason, and this has been recognized by the Third Circuit:

> It is settled that Congress has sovereignty over the territories of the United States and accordingly has power to legislate for a territory with respect to all subjects upon which the legislature of the state might legislate within the state. (Citation). It is also settled that Congress may delegate to a territory such of these powers as it sees fit. (Citation). And the right of Congress to revise, alter and revoke these delegated powers does not diminish the powers while they reside in the Territory. Harris v. Boreham, 233 F.2d 110, 113 (3rd Cir. 1956).

The Third Circuit continues:

> The aim of Congress is to give the territories full power of local self-determination. The local laws enacted under the legislative power granted by Congress are accordingly territorial laws, not laws of the United States. Id. at

p.113.

The legislative history, as shown below, of Guam's Organic Act demonstrates Congress's intention was the same with respect to Guam.

> These principles apply to the Unincorporated Territories, such as the Virgin Islands. For it has been held that Congress may create a territorial government for the unincorporated territory and may confer upon it an autonomy similar to that of the United States. Gromer v. Standard Dredging Company, 224 US 362 (1912) (Additional Citations). And the territorial body politic thus created may be endowed with attributes of sovereignty, such as non-liability to suit without its consent. Harris v. Boreham, 233 F.2d at p.114.

It is true that the Third Circuit held that the Unincorporated Territory of the Virgin Islands is not a "person" for purpose of 42 USC Section 1983. Ocasio v. Bryan, 374 F.2d 11 (3rd Cir. 1967). But this case was decided prior

to Monell v. New York City Department of Social Services, Supra, and at a time when no governmental entities were included within the scope of "persons." Monroe v. Pape, 365 US 167, 5 L.Ed.2d 492, 81 S.Ct. 473 (1961).

Congress has provided Guam with a degree of sovereignty which clearly separates it from the federal government, but the converse is the basis on which the Ninth Circuit builds its argument.

> Guam is an unincorporated territory whose status is governed by the Organic Act of 1950, 48 USCA Section 1421 through 1428(e) (1987). It 'enjoy(s) only such powers as may be delegated to it by Congress in the Organic Act...' Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285, 1286 (9th Cir. 1985) cert. den. 475 US 1081 (1986); See also, Liebowitz, the applicability of federal law to Guam, 16 Va. J. Int'l L. 21, 34 (1975). ('Guam has no power to act in the absence of a specific authorization from Congress'). As

such, it 'is in essence an instrumentality of the federal government,' Id., much like a federal department or administrative agency. See, United States v. Wheeler, 435 US 313, 320-321 (1978). Like an agency, it may administer its own affairs; it may draft laws of general applicability, select personnel, exact penalties and even create an entire infrastructure of government. But, also like an agency, its authority to administer itself and to set policy is derived from, and circumscribed by, Congress.

Admittedly, the analogy between Guam and an administrative agency such as the Federal Trade Commission is counter-intuitive. Guam seems more like a state or a municipality than a run-of-the-mill federal agency. After all, Guam elects government officials, its citizens participate politically and the territory enjoys many of the trappings of a sovereign governmental entity. See 48 USC Section 1421-1428(e). But there are also very significant differences, differences we deem conclusive for purposes of the question presented to us. Guam marches squarely to the beat of the federal drummer; the federal government bestows on Guam its powers and, unlike the states, which retain their

> sovereignty by virtue of the Constitution, Guam's sovereignty is entirely a creation of federal statute. Ngiraingas v. Sanchez, Slip Opinion at p.12199.

There is a distinct difference in philosophies and holdings between the Third Circuit and the Ninth Circuit. The Third Circuit expressly holds that the fact that Congress retains Constitutional authority over the territories does not "revise, alter and revoke" the powers, and consequently the independence and sovereignty of the territory, while such powers reside in the territory. Harris v. Boreham, 233 F.2d 110, 113 (3rd. Cir. 1956).

Another political entity over which Congress has plenary authority is the District of Columbia. Article One, Section 8, Clause 17 of the United States Constitution provides that

Congress "shall have the power...to exercise exclusive legislation in all cases whatsoever, over such district...as may, by Cession of particular states, and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be..."

> The power is plenary. Not only may statutes of Congress of otherwise nationwide application be applied to the District of Columbia, but Congress may also exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state for local purposes. Palmore v. United States, 411 US 386, 397, 93 S.Ct. 1670, 1676 (1973).

The District of Columbia is not a state, it is a mere instrumentality of the federal government. District of

Columbia v. Carter, 410 US 958, 93 S.Ct. 1411 (1973).

The language of the U.S. Supreme Court in describing the District of Columbia in District of Columbia v. Carter, id., is identical to the language of the Ninth Circuit in describing Guam in Sakamoto v. Duty Free Shoppers, Ltd., Supra, i.e. an "instrumentality." Moreover, the Ninth Circuit has also recognized that Congressional power under Clause 17 with respect to the District of Columbia is plenary. United States v. Jenkins, 734 F.2d 1322 (9th Cir. 1983).

The United States Congress has provided for District of Columbia self-government. See, District of Columbia Self-Government and Governmental Reorganization Act, PL 93-198; 87

Statutes 774, 1 US Congressional and Administrative News, 93rd Congress, 1st Session (1970) at p.847. The statement of the purposes of this act, (Section 102), acknowledges the "ultimate legislative authority over the nation's Capitol granted by Article One, Section 8 of the Constitution," and states that it is the "intent of Congress...to delegate certain legislative powers to the government of the District of Columbia; authorize the election of certain local officials by the registered qualified electors in the District of Columbia; grant to the inhabitants of the District of Columbia powers of local self-government..." As will be demonstrated below, this intent is not unlike the intent of Congress in establishing the Organic Act of Guam.

However, the important point is the manner in which the Courts have interpreted Section 1983 with respect to the District of Columbia. In Carter v. District of Columbia, 795 F.2d 116 (DC Cir. 1986), Judges Ginsberg and Bork delivering the Opinion together, held the District of Columbia was amenable to suit under Section 1983. It is noteworthy that the District of Columbia Circuit did not engage in a discussion of the differences between the District of Columbia and a municipality chartered pursuant to state law or otherwise.

Constitutionally, the District of Columbia is similar to the Territory of Guam, and is amenable to suit under Section 1983. It is more similar to Guam than the Federal Trade Commission, used in the Ninth Circuit below as an

analogy. Congress has plenary control over both Guam and the District of Columbia, and there is no reason that Section 1983 should apply to one, and not the other. Both march "squarely to the beat of the federal drummer," and "the federal government bestows on Guam (and the District of Columbia) its powers and, unlike the states, which retain their sovereignty by virtue of a Constitution, Guam's (and the District of Columbia's) sovereignty is entirely a creation of federal statute." Ngiraingas v. Sanchez, Slip Opinion at p.12199.

In Fleming v. Department of Public Safety, 837 F.2d 401 (9th Cir. 1988), the Ninth Circuit held that states are person for the purpose of Section 1983. This is a question which has never been

resolved by the United States Supreme Court. See, Quern v. Jordan, 440 US 332, 59 L.Ed.2d 358, 99 S.Ct. 1139 (1979) concurring, Brennan J. The Ninth Circuit also holds in Fleming that Section 1983 applies to the Commonwealth of the Northern Mariana Islands because it applies to Guam. Section 502(a)2 Act of March 24, 1976, PL 94-241, 90 Stat. 263. Fleming, Supra. Fleming, 837 F.2d at p.404-5. The Court notes in Fleming that the only limitation on the applicability of Section 1983 is the Eleventh Amendment, which protects only states. Pennhurst State School and Hospital v. Halderman, 465 US 89, 98-99 (1984); Alabama v. Pugh, 438 US 781, 782 (1978). Fleming, 837 F.2d at p.405-6. Similarly, the Eleventh Amendment does not apply to Guam. 48 USC 1421(b)(u).

The Ninth Circuit analyzed the

question of whether the Commonwealth constitutes "a person" under Section 1983. Id., at 837 F.2d at 406. The analysis relied upon by the Ninth Circuit in holding that the Commonwealth of the Northern Mariana Islands is a person for the purpose of Section 1983 is that the Eleventh Amendment does not apply, and all other governmental entities which are not protected by the Eleventh Amendment are "persons" under Section 1983:

> We next consider whether the Commonwealth constitutes a 'person' under Section 1983. We address this issue because the Supreme Court has not expressly decided whether a state constitutes a person under the act. Quern v. Jordan, 440 US 332 (1979), limits the applicability of Section 1983 to states solely upon the force of the Eleventh Amendment. The Court said that Congress would have had to have been far more explicit about overriding such immunity in order to subject states to suits under

> Section 1983 without their consent. Id. at 343-45. Indeed, the Court in Quern distinguished Monell strictly on Eleventh Amendment grounds, noting that Monell is 'limited to local government units which are not considered part of the state for Eleventh Amendment purposes.' Id. at p.338. (Quoting Monell, 436 US at 690, n.54). The law treats local governments differently from states under Section 1983 not because local governments are somehow more like persons, but simply because local governments, unlike states, are not covered by the Eleventh Amendment. We conclude that governmental entities are persons for purposes of Section 1983, but that those entities protected by the Eleventh Amendment remain immune from suits brought in federal court without their consent. Accordingly, while the Commonwealth enjoys many attributes of statehood, it may nevertheless be sued under Section 1983; the Commonwealth is a person for purposes of that statute and, as we have concluded supra, it like local governments does not enjoy Eleventh Amendment immunity. Fleming v. Department of Public Safety, 837 F.2d at p.406.

Why then is Guam not a "person" for the purpose of Section 1983? The

Ninth Circuit answers that question in footnote 1 in Ngiraingas v. Sanchez at p.12200.

> Guam's relationship with the United States Government distinguishes this case from Fleming v. Department of Public Safety, Amended Slip Op. 4445 (9th Cir.) April 8, 1988, where we held that the Commonwealth of the Northern Mariana Islands (CNMI) is a person for the purposes of Section 1983. Id. at p.4455. The CNMI has a unique relationship with the United States; the original trusteeship agreement obligated the United States to 'promote the development of the inhabitants of the trust territory for its self-government or independence;' See Trusteeship Agreement for the former Japanese Mandated Islands, July 18, 1947, Art. 6, Sec. 1, 61 Stat. 3301, T.I.A.S. #1665, 8 U.N.T.S. 189, quoted in Fleming, Amended Slip Op. at 4449. Significantly, 'the United States does not possess sovereignty over the trust territory' but merely 'exercises powers of administration, legislation, and jurisdiction ...pursuant to an agreement with the United Nations.' United States v. Covington, 783 F.2d 1052, 1055 (9th Cir. 1985) cert. den. 107 S.Ct. 117 (1986);

> Commonwealth of Northern Mariana Islands v. Atalig, 723 F.2d 682, 684 (9th Cir.) cert. den. 467 US 1244 (1984). Guam's relation to the United States is entirely different. Guam has no separate sovereign status; unlike CNMI, it 'is subject to the plenary power of Congress and has no inherent right to govern itself.' Atalig, 723 F.2d at p.687; See, also, Liebowitz, 16 Va. J. Int'l L. at 62-63 ('Authority of the Guam Government depends entirely upon the will of Congress, and is at all times subject to such alterations as Congress may see fit to adopt'); Cf. Barusch v. Calvo, 685 F.2d 1199, 1202 (9th Cir. 1982), (distinguishing CNMI from Guam with respect to border searches).
>
> Fleming does not state that Guam is a person or that Bunyon, 770 F.2d 773 (9th Cir. 1985), cert. den. 477 US 903 (1986), stands for that proposition. It says only that Section 1983 is applicable in Guam, as well as in the several states. See Amended Slip Op. at p.4451, n.2. In later discussion holding CNMI as a person, Guam is not mentioned.

It is the "relationship with the United States Government" which distinguishes the CNMI from Guam. The

Ninth Circuit relies upon the Trusteeship Agreement in which the United States was obligated "to promote the development of the inhabitants of the trust territory towards self government or independence." But this was precisely the purpose of the Organic Act for the Territory of Guam. The legislative history of the Organic Act of Guam is contained in 2 USC Congressional Service, 81st Congress, 2nd Session, 1950, p.2840. After a short history of the purpose of the bill, the Committee on Interior and Insular Affairs reported that the Organic Act:"

> Establishes democratic local government for the Island and guarantees human freedoms under the authority of Congress rather than the executive branch. American citizenship would be conferred on the approximately 27,000 native Guamanians who gave

> such valiant proof of their loyalty to the United States and American traditions in two world wars, including four years of enemy occupation by the Japanese armed forces. A Bill of Rights is provided; a representative local government formed in the American tradition; an independent judiciary created, administering a system of law based on local needs and local traditions, all within the American framework of fundamental fairness and equality; and the scope of executive authority is defined and limited. Id. at p.2841.

The committee further reports on the "Responsibility of Congress:"

> In addition to the obligations under the Treaty of Paris, the United States has additional treaty obligations with respect to Guam as a non-self governing territory. Under Chapter 11 of the Charter of the United Nations, ratified by the Senate, June 26, 1945 (59 Stat. at p.1048), we undertook, with respect to the peoples of such territories, to ensure political advancement, to develop self-government, and taking 'due account of the political aspirations of the peoples,...to assist them in progressive development of their free political institutions...'

There is no significant difference in the responsibilities of the United States under the Trusteeship Agreement for the former Japanese Mandated Islands and in the Charter of the United Nations since Guam is a non-self governing territory. Congress has limited its plenary authority to the purposes stated in its acceptance of the United Nations Charter. Moreover, PL 94-584 amended the Organic Act to permit the creation of a Constitution for the Territory of Guam.

The decisions of the Ninth Circuit are internally inconsistent. There is no justification in the logic of Fleming for excluding the Territory of Guam from liability under Section 1983.

The decisions of this Court support the view that Section 1983

should be as inclusive as it may be fairly interpreted. This is apparent in two closely related lines of cases, the first beginning with Monell v. New York City Department of Social Services, Supra, and the other in Ex Parte Young, 209 US 123, 52 L.Ed. 714, 28 S.Ct. 441 (1908). In holding that local governmental entities are amenable to suit as persons under Section 1983, the Court noted that the Civil Rights Act was:

> Intended to provided a remedy, to be broadly construed against all forms of official violation of federally protected rights. Therefore, absent a clear statement in the legislative history supporting the conclusion that Section One was not to be applied to the official acts of a municipal corporation -- which simply is not present -- there is no justification for excluding municipalities from the 'persons' covered by Section One. Monell, 436 US at p.700.

Similarly, there is no clear statement excluding territories from the definition of "persons" in the Civil Rights Act.

> The act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and Constitutional provisions authorizing such statutes are liberally and beneficially construed. It would be most strange and, in civilized law, monstrous, were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and Constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people...Monell, Supra, 436 US at p.684, citing comments of Representative Shellabarger.

Barring an explicit Constitutional immunity such as the Eleventh Amendment which is applicable only to the states, or a clear indication that the

governmental entity in question was not within the scope of "person," all forms of government should be subject to liability under 42 USC Section 1983. The Ninth Circuit has recognized that states are "persons." Fleming v. Department of Public Safety, Supra, as has Justice Brennan in his concurrence in Quern v. Jordan, Supra.

The Supreme Court has ruled that all governmental entities are liable as persons under Section 1983, except states and the only reason states are immune is because of the Eleventh Amendment:

> Mr. Justice Brennan's opinion in the Judgment concurring states that Edelman v. Jordan, supra, had held that Section 1983 did not override state's immunity, for the reason, as the Court later stated in Fitzpatrick, that 'the Civil Rights Act of 1871, 42 USC Section 1983... had been held in Monroe v. Pape, 365 US 167, 187-191, (5

L.Ed.2d 492, 81 S.Ct. 473 (1961)), to exclude cities and other municipal corporations from its ambit; that being the case, it could not have been intended to include states as parties defendant. Post, at 351, 59 L.Ed.2d at 373. Since Monell overruled the Monroe holding that cities and other municipal corporations are not 'persons' within the meaning of Section 1983, Mr. Justice Brennan's Opinion argues that the 'premise' of Edelman has been undercut.' Post at 351, 39 L.Ed.2d at 373. The fallacy of this line of reasoning was aptly demonstrated last term by Mr. Justice Powell in his concurring opinion in Hutto, where he stated, 'the language in question from Fitzpatrick was not essential to the Court's holding in that case. Moreover, this position ignores the fact that Edelman rests squarely on the Eleventh Amendment immunity, without adverting in terms to the treatment of the legislative history in Monroe v. Pape... 57 US at 708-709 n.6, 357 L.Ed.2d 522, 98 S.Ct. 2565 (1978). In fact, Monroe v. Pape is not even cited in Edelman. Quern v. Jordan, 440 US 332, 339, n.7, 59 L.Ed.2d 358, 365.

Edelman v. Jordan, 415 US 651, L.Ed.2d 662, 94 S.Ct. 1347 (1974). See e.g.

Alabama v. Pugh, 438 US 781, 57 L.Ed.2d 1114, 98 S.Ct. 3057 (1978); Hutto v. Finney, 437 US 678, 57 L.Ed.2d 522, 98 S.Ct. 2565 (1978); Milliken v. Bradley, 433 US 267, 53 L.Ed.2d 745, 97 S.Ct. 2749 (1977); Ex Parte Young, 209 US 123, 52 L.Ed. 714, 28 S.Ct. 441 (1908). All these cases which define the scope of the states' immunity rest solely upon the Eleventh Amendment. However, the Ninth Circuit has ruled that the unincorporated Territory of Guam, its police force and all necessary institutions of government are immune based upon an Organic Act which neither mentions the Eleventh Amendment nor 42 USC Section 1983, nor any other source of immunity.

In Owen v. City of Independence, 445 US 622, 63 L.Ed.2d 763, 100 S.Ct.

1398 (1980), this Court determined that governmental entities do not share the "good faith" immunity of its officials. See e.g. Procunier v. Navarett, 434 US 555 (1978). Nor do governmental entities have any other type of immunity other than the Eleventh Amendment. The Court studied the language of Section 1983 and stated that "by its terms, Section 1983 'creates a species of tort liability that on its face admits of no immunities.' Imbler v. Pachtman, 424 US 404, 417, 47 L.Ed.2d 124, 96 S.Ct. 984 (1976)." Owen v. City of Independence, 445 US at p.635.

The Supreme Court in Owen also discusses the history of sovereign immunity and notes:

> ...There is no tradition of immunity for municipal corporations, and neither history nor policy support a construction

> of Section 1983 that would justify the qualified immunity accorded the City of Independence by the Court of Appeals. We hold, therefore, that the municipality may not assert the good faith of its officers or agents as a defense to liability under Section 1983. Owen, 445 US at p.638.

Another type of immunity which was discussed in Owen arose from the distinctions between "governmental" and "proprietary" functions, and "discretionary" or "ministerial" functions. Owen, 445 US at p.644. The Court determined that both types of immunity are inapplicable to a Section 1983 action. The Court notes with respect to "discretionary" immunity:

> That common law doctrine merely prevented Courts from substituting their own judgment on matters within the lawful discretion of the municipality. But a municipality has no 'discretion' to violate the federal Constitution; its dictates are absolute and imperative. Owen v. City of Independence, 445 US at

p.649.

This conclusion is even more compelling when considered in the context of Guam -- an unincorporated territory. The only discretion that resides in Guam is that conferred by Congress. This is not the case of a municipality which is chartered pursuant to state law. Moreover, the provisions of the Constitution which are made directly applicable to Guam in the Organic Act demonstrate that any discretionary latitude has been stripped by the Congressional intent to apply only specific provisions to the territory, which "shall have the same force and effect (in Guam) as in the United States or in any state of the United States." 48 USC Section 1421(b)(u). Therefore, Guam also has no

discretion to violate applicable provisions of the Constitution.

The Court also notes policy decisions for declining qualified immunity to governmental entities:

> Our rejection of a construction of Section 1983 that would accord municipalities a qualified immunity for their good faith Constitutional violations is compelled both by the legislative purpose in enacting the statute and by considerations of public policy. The central aim of the Civil Rights Act was to provide protection to those persons wronged by the 'misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law.' (Citation). By creating an express federal remedy, Congress sought to 'enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a state and represent it in some capacity, whether they act in accordance with their authority or misuse it. (Citation).
>
> How 'uniquely amiss' it would be, therefore, if the government itself -- 'the social organ to which all

in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct' -- were permitted to disavow liability for the injury it has begotten. (Citations). A damages remedy against the offending party is a vital component of any scheme for vindicating cherished Constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very right it has transgressed. Yet owing to the qualified immunity enjoyed by most governmental officials, see, Scheuer v. Rhodes, 416 US 232, 40 L.Ed.2d 90, 94 S.Ct. 1683, 71 Oh. Ops. 2d 474 (1974), many victims of municipal malfeasance will be left remediless if the city were also allowed to assert a good faith defense. Unless counterveiling considerations counsel otherwise, the injustice of such a result should not be tolerated. Owen v. City of Independence, 445 US at p.651.

There are no "counterveiling considerations" which immunize the Government of Guam or take it from the scope of Section 1983. Significantly,

there is also no interest of Federalism which is served by interpreting Section 1983 to exclude unincorporated territories. The reasoning which is employed by the Ninth Circuit is flawed, specifically, that Guam is an instrumentality of the federal government, the federal government is immune, and therefore Guam is immune. Acts under territorial law are specifically included in Section 1983 but acts under federal law are not. Therefore, all persons acting under color of territorial law in a territory, who deprive an individual of Civil Rights, are liable. There is no reason to exclude the territory itself from the term "person." However, no one acting under color of federal law in a territory would be liable under Section

1983 for a deprivation of Civil Rights, therefore the federal government logically is immune. Acts under color of state law give rise to an action under Section 1983, but states are not liable in damage actions solely on the basis of the Eleventh Amendment. Quern v. Jordan, Supra. Edleman v. Jordan, Supra.

Citizens of Guam are citizens of the United States. However, they do not vote for President, nor do they have a voting representative on the floor of Congress. They are taxed and pay Social Security tax. Yet they carry U.S. passports and are citizens. How is this Equal Protection? Now they have an ineffective remedy for violations of Civil Rights under the Ninth Circuit

opinion in Ngiraingas v. Sanchez.

It is the interests of Federalism which give rise to the political anomalies. States vote for president. Attorney General of Guam v. United States, 738 F.2d 1017 (9th Cir. 1984) and that is the reason the residents of Guam do not vote for president. Only citizens of states can have Representatives on the floor of Congress, and that is the reason the delegate from Guam has no vote. But there is no interest in Federalism justifying an incomplete Civil Rights remedy in the Territory of Guam. The Government of Guam is virtually omnipotent over the residents of the Territory. Taxes are rebated and enforced by the Department of Revenue

and Taxation of the Government of Guam, the Police Force and Fire Departments are run by the Government of Guam, electricity is provided by the Government of Guam, water is provided by the Government of Guam, the public schools are run by the Government of Guam, zoning regulations are promulgated by the Government of Guam, business licenses are provided by the Government of Guam. Effective remedies are essential, and the only effective remedy that exists is the Federal Civil Rights Act.

CONCLUSION

In conclusion, the Petitioners ask this Court to grant Certiorari to the United States Court of Appeals for the Ninth Circuit on the basis that its

decisions with respect to the interpretation of Section 1983 are internally inconsistent and inconsistent with both the Third Circuit and the DC Circuit. It is recognized by Petitioners that the inconsistencies are not direct, but are more properly characterized as inconsistencies in fundamental assumptions and philosophies, but it is submitted that there is sufficient Constitutional and legal similarities between the entities which are the subjects of the interpretation to warrant the consideration of the United States Supreme Court. Most importantly, vindication of essential Civil Rights is at issue and this alone should justify the consideration of this Court.

Respectfully Submitted,

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APPENDIX A

Memorandum Order of the District Court of Guam Territory of Guam (Filed on October 30, 1986)

FILED
DISTRICT COURT OF GUAM
AGANA, GUAM
OCT. 30, 1986
MARY L. MICHELS
CLERK OF COURT
DISTRICT COURT OF GUAM

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

Decided October 30, 1986
Civil Case No. 85-0064

MEMORANDUM ORDER

ALEX NGIRAINGAS, et al.,
Plaintiffs-Appellees

vs.

FRANCISCO Q. SANCHEZ, et al.,
Defendants-Appellants

Before:

Cristobal C. Duenas
District Judge

On September 24, 1985, plaintiffs filed this action against certain Government of Guam police officers individually and in their official capacity, the director of the Department of Public Safety (the Guam Police Department)(hereinafter "GPD"), in her official capacity and the Government of Guam (hereinafter "GovGuam"), alleging that defendants deprived plaintiffs of their constitutional rights in violation of 42 USC 1983, 1984 and 1985.

Plaintiffs filed a third amended complaint on June 4, 1985, alleging violations of 42 USC 1981, 1983, 1985 and 1986, adding GPD as a named defendant. Plaintiffs invoke the pendent and ancillary jurisdiction of this Court to determine causes of action arising under the laws of the Territory of Guam. Plaintiffs seek one hundred million dollars in damages and attorney's fees.

The third amended complaint alleges that on March 31, 1983, plaintiffs were arrested by defendant police officers and taken to Pedro's Plaza, GPD Headquarters, where defendant police officers assaulted, beat, intimidated and coerced them into signing "Rights Waiver" forms and writing incriminating statements in violation of their civil rights, their rights under the Organic Act of Guam and the Fifth and Fourteenth Amendments of the U.S. Constitution. Plaintiffs contend that physical abuse and coercion are de facto policies of GovGuam implemented by GPD.

Prior to the filing of this action plaintiffs filed a claim with the Office of the Attorney General pursuant to Guam Government Code 6500 et. seq., as amended by P.L. 17-29, which was denied on March 19, 1985.[1/] This action was filed over two years and six months from the alleged incidents giving rise to this action.

Defendants Jose T. Terlaje, Joe P. Balajadia, Elmer F. Sardoma, Judith Guthertz, GPD and GovGuam (hereinafter collectively "defendants") move this Court for an order dismissing this action pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure for lack of jurisdiction and under Rule 56 of the Federal Rules of Civil Procedure. Defendants argue that GovGuam, GPD and the individual defendants in their official capacities are immune from suit under 42 USC 1981, 1983, 1985 and 1986; the claims against the defendants in their individual capacities are barred by the statute of limitations; and this Court lacks jurisdiction to hear the state tort claims.

Defendant's motion came on regularly to be heard before the Honorable Cristobal C. Duenas on the 19th day of September, 1986, the moving defendants represented by Patrick Mason, Esq., Assistant Attorney General, plaintiffs, represented by Jeffrey Siegel, Esq. After argument by counsel and being fully advised defendants' motion to dismiss was granted in its entirety. At plaintiffs request, this Court extended its order to include the non-moving defendants.

I. GOVERNMENTAL IMMUNITY.

Plaintiffs bring this action, in part, against GovGuam, GPD, the director of GPD and certain police officers acting in their official capacities under 42 USC 1981, 1983, 1985 and 1986. Defendants move to dismiss this action relying on this Court's earlier ruling in Ignacio v. Salas, District Court of Guam Civil Case No. 79-00118 (1972), which holds that GovGuam is immune from suit under 42 USC 1983 by virtue of the Organic Act of Guam.

Plaintiffs urge that GovGuam is not immune from suits which allege violations of civil rights. Plaintiffs reason that GovGuam is a "person" within the meaning of 42 USC 1983; Guam has no sovereign immunity because the Eleventh Amendment does not extend to territories; and GovGuam is not required to waive immunity to be liable for suits involving constitutional rights.

Courts will not find an intent to abrogate state immunity in a statute of general applicability. Congress did not intend to abrogate the sovereign immunity of states by the passage of 42 USC 1983. See Quern v. Jordan, 440 U.S. 332, 99 S.Ct. 1139 (1979).[2/]

Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 904, 79 L.Ed 2d 67 (1984) reaffirms that a sovereign's immunity may only be waived by unequivocal consent. Congress has the authority to abrogate immunity conferred by the Eleventh Amendment with respect to rights protected by the Fourteenth Amendment. Similarly, the Supreme Court requires an "unequivocal expession of

congressional intent to 'overturn the constitutionally guaranteed immunity of the several states.'" 465 U.S. at 99.

Guam is entitled to the same status as any city or state of the Union and is not to be penalized for being a territory. Although the Eleventh Amendment does not extend to Guam, 48 USC 1421(b)(u), GovGuam is immune from suit until Congress or the Guam Legislature unequivocally waives its immunity. Neither Congress nor the Guam Legislature has waived Guam's sovereign immunity with respect to suits brought under 42 USC 1981, 1983, 1984 and 1985. We extend the court's reasoning to hold that Congress did not intend to abrogate the sovereign immunity of states in enacting 42 USC 1981, 1985 and 1986.

Like the application of the Eleventh Amendment to states, the Organic Act of Guam bars some suits in which government employees are named in their official capacity. To determine when a suit brought against an individual is in fact against the Government of Guam we look to whether the relief sought would effect the public treasury. Damaru v. Kupperman, 735 F.2d 1139 (9th Cir. 1984). The Eleventh Amendment bars suits against state officials when 'the state is the real substantial party in interest.' Id. at 1146 citing Pennhurst supra.

> The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the judgment would be to "restrain the Government from acting, or compel it to Act."

Demery v. Kupperman, supra at 1146, citing Dugan v. Rank, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed 2d 15 (1963).

A judgment against the individual defendants in their official capacity would expend itself on the public treasury. The real, substantial party of interest is the Government of Guam.

Defendants' motion to dismiss is granted with regards to GovGuam, The GPD and the police officers in their official capacities.

STATUTE OF LIMITATION

Having dismissed the Government of Guam, GPD and the individual defendants in their official capacities we determine whether the claims against the defendant police officers in their individual capacities are timely filed.

Except for 42 USC 1986, the Civil Rights statutes do not provide a statutory period of limitation. Plaintiffs rely on the statute of limitations set forth in Guam Government Code Section 6500 et seq. to determine the applicable statute of limitations. Plaintiffs urge that the statutory period applying to claims against GovGuam should govern the period of limitation in which claims against individuals should be filed who ultimately will be joined in the same action.

Section 6500.05(b), as amended by P.L. 17-29, provides in relevant part:

> Every action filed under this Chapter shall be barred unless commenced within eighteen (18) months from the time the notice that the claim was rejected was served as provided in Article 2 of this Chapter, or within twenty-four months after the claim was filed in cases where the government does not reject the claim.

Defendants urge that the most appropriate statute of limitation is Guam Code of Civil Procedure Section 339, which provides a two-year statutory period of limitation for— actions alleging personal injuries.

Because there is no specific or otherwise relevant federal statute of limitations for causes of action brought under 42 USC 1981, 1983 and 1985 the most appropriate state statute of limitations is appropriate. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462, 95 S.Ct. 1716, 44 L.Ed 2d 295 (1975), Tyler v. Reynolds Metals Co., 600 F.2d 232 (9th Cir. 1979); Conerly v. Westinghouse Elec. Corp. 623 F2.d 117 (9th Cir. 1980); Peterson v. Fink, 515 F.2d 815 (9th Cir. 1975); Briley v. State of California, 564 F.2d 849 (9th Cir. 1977); Shouse v. Pierce County, 559 F.2d 1142 (9th Cir. 1977).[3]

It was clearly the law in this Circuit both when the causes of action accrued giving rise to this action and when this action was filed that the applicable statute of limitations for claims under 42 USC 1981, 1983 and 1985 was governed by the most appropriate Guam Code of Civil Procedure section providing periods of limitation. Board of Regents of the University of the State of New York v. Tomanio, 446 U.S. 478, 483-484, 100 S.Ct. 1790, 1994-5, 64 L.Ed 2d 440

(1980). "The federal courts apply the state statute of limitations applicable to the most similar state cause of action." The only issue is which Guam Code of Civil Procedure section applies.

Plaintiffs' cause of action, which sound in tort, can be characterized as alleging false imprisonment, assault, battery and intentional infliction of emotional distress which allegedly give rise to violations of Civil Rights.

We agree with defendants that the most appropriate statutory limitations period is found at Guam Code of Civil Procedure, 339, as amended by P.L. 15-106:5, which reads:

> Within two (2) years --
> An action for assault, battery, false imprisonment, seduction of a person below the age of consent, or for injury to, or for death of, a person caused by the wrongful act or neglect of another.

This action was filed over two years and six months from the accrual of the cause of action. Plaintiffs could have filed suit against the individual defendants and asked this Court to stay proceedings until the administrative efforts to satisfy their claim under Government of Guam Code 6500 et seq. could have been completed. In a real sense, plaintiffs have slept on their civil rights claims against the defendant police officers in their individual capacity. The fact that slumber may have been induced by faith in the adequacy of their statutory period under the Government Claims Act is of little relevance inasmuch as the statutory period applicable to claims against individual defendants.

We dismissed the defendants sued in their individual capacity for failure to file this action within two years from the accrual of the causes of action.

42 U.S.C. SECTION 1986

The failure to establish any right to relief justifies dismissal of an interrelated and dependent cause of action under 42 USC 1986. The claims arising under 42 USC 1986 are dismissed.

Even if the 42 USC 1986 claims were not dismissed on the aforementioned ground they would be dismissed for failure to initiate this action within the mandatory one year period of limitation provided in 1986.[4/]

Section 1986 provides in pertinent part:

> . . . But no action under this section shall be sustained which is not commenced within one year after the cause of action has accrued.

Plaintiffs' misreliance on Guam Government Code 6500 et. seq. cannot defeat Congress' mandate. Plaintiffs' failed to file their action within one year.

PENDENT JURISDICTION

Defendants ask this Court to dismiss the pendent tort claims arising under Guam law.[5/]

Plaintiffs allege that the Government of Guam and GPD negligently employed and retained in their employ the individual defendants, although the Governor of Guam

and GPD knew, or in the exercise of reasonable care should have known, that the named defendants have violent prospensities and were not tempermentally suited to the position of police officers and thereby created a substantial risk of harm to the plaintiffs and the general public.

Plaintiffs additionally allege that the individual defendants committed assault, battery, intentional infliction of emotional distress, malicious interrogation, negligence and gross negligence under the laws of the Territory of Guam.

This Court has pendent jurisdiction to hear state tort claims which derive from a common nucleus of operative fact and are such that a plaintiff would be expected to try them in one proceeding. It is clear that plaintiffs could not have brought suit in federal court solely on the state tort claims.

The doctrine of pendent jurisdiction enables district courts, incidental to its authority to adjudicate federal claims properly before it, to also pass on related nonfederal claims of which it could not otherwise take cognizance were they presented alone. A district court's jurisdiction over state law claims, which lack an independent basis of federal subject matter, is entirely derivative of its jurisdiction over the federal claim. Hunter v. United Van Lines, 746 F.2d 635 (9th Cir. 1984); Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed. 2d 274 (1978).

Absent an independent basis of federal subject matter jurisdiction may not be exercised over pendent claims. Having

dismissed all the federal subject matter claims without prejudice, this Court dismisses the state claims without prejudice.

IT IS SO ORDERED.

Dated this 30th day October, 1986.

FOOTNOTE

1/ The Government Claims Act ("GCA"), as amended, by P.L. 17-29, became effective November 9, 1983. The GCA applies to the entire Government of Guam which includes all agencies, department, instrumentalities, public corporations, and all other entities of the Government. The GCA waives immunity in contract actions and for negligent acts of its employees. Guam is immune from causes of action sounding in intentional torts.

2/ In contrast, Congress specifically waived the immunity of states in actions brought pursuant to Title VII. Edelman v. Jordan, 415 U.S. 651 (1974).

3/ Plaintiffs dispute this basic principle. Plaintiffs rely entirely on the fact that Wilson v. Garcia, ___ U.S. ___, 105 S.Ct. 1938 (1985), which supports defendants position that a two-year statute of limitations applies to actions brought under 42 USC 1981, 1983 and 1985, should not be given retroactive application. We recognize the holdings that Wilson v. Garcia, supra, may be applied retroactively if to do so would increase the statutory period of limitation. Jones v. Bechtel, 788 F.2d 571 (9th Cir, 1986); Marks v. Parra, 785, F.2d 1419 (9th Cir. 1986). Wilson v. Garcia's, supra, holding that the most appropriate state statute of limitations applies to 42 USC 1981, 1983 and 1985 is not novel. Wilson v. Garcia, supra, resolves a conflict between the jurisdiction in favor of that previously

held by the Ninth Circuit. We need not consider whether Wilson v. Garcia, supra, should be applied retroactively.

4/ Plaintiffs suggest that the statutory one-year limitation period imposed under 42 USC 1986 should be disregarded in favor of the Government of Guam Code 6500 et seq., the "Government Claims Act." Under the GCA a claimant has 18 months after a claim is rejected. If the government takes no action in response to a claim a claimant has 24 months after a claim is filed with the government to initiate legal proceedings. 6500.05.

Section 6500.05 does not apply to the filing of an action against Government of Guam employees in their individual capacity.

5/ While the doctrine of ancillary jurisdiction is relied upon by plaintiffs, pendent jurisdiction, not ancillary jurisdiction is the jurisdictional basis on which this Court could hear the state tort claims.

APPENDIX B

**Judgment Of the
District Court of Guam
Territory of Guam
(Filed October 30, 1986)**

FILED
DISTRICT COURT OF GUAM
AGANA, GUAM
OCT. 30, 1986
MARY L. MICHELS
CLERK OF COURT
DISTRICT COURT OF GUAM

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

Decided October 30, 1986
Civil Case No. 85-0064

JUDGMENT

ALEX NGIRAINGAS, et al.,
Plaintiffs-Appellees

vs.

FRANCISCO Q. SANCHEZ, et al.,
Defendants-Appellants

This matter came on for defendants', Jose T. Terlaje, Elmer F. Sardoma, Judith Guthertz, Department of Public Safety (the Guam Police Department) and the Government of Guam, Motion for Summary Judgment and Motion to Dismiss before the Court, and the issues having been duly heard and a Memorandum Order having been duly rendered,

IT IS HEREBY ORDER AND ADJUDGED that defendants' Motion for Summary Judgment and Motion to Dismiss are granted as to all defendants.

Dated this 30th day of October, 1986.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEX NGIRAINGAS, OSCAR ONGKLUNGEL, JIMMY MOSES, ARTHUR MECHOL, JONAS NGEHEED and BOLANDIS NGIRAINGAS,
Plaintiffs-Appellants,

v.

FRANCISCO Q. SANCHEZ, individually and as a Police Officer, JOSEPH R. CRUZ, individually and as a Police Officer, JOSE T. TERLAJE, individually and as a Police Officer, JOE P. BALAJADIA, individually and as a Police Officer, ELMER F. SARDOMA, individually and as a Police Officer, JOSEPH A. SAN NICOLAS, individually and as a Police Officer, JUDITH P. GUTHERTZ, in her Official Capacity as Director of the Department of Public Safety (Guam Police Department), THE GUAM POLICE DEPARTMENT and THE GOVERNMENT OF GUAM,
Defendants-Appellees.

No. 86-2840

D.C. No. CV-85-64

OPINION

Appeal from the United States District Court
for the District of Guam
Cristobal C. Duenas, District Judge, Presiding

Argued and Submitted
February 23, 1988—Pasadena, California

Filed June 7, 1988

Before: Alex Kozinski and David R. Thompson, Circuit Judges, and William P. Gray,* Senior District Judge.

Opinion by Judge Kozinski

SUMMARY

Civil Rights/Constitutional Law

Appeal from dismissal of suit. Affirmed in part, reversed in part and remanded. The court held that Guam is not a "person" for purposes of a section 1983 suit.

Appellants were picked up by Guam police on suspicion of committing certain narcotics offenses. Defendant police officers allegedly harrassed and beat appellants. Appellants sued seeking damages under 42 U.S.C. §§ 1981, 1983, 1985 and 1986. The district court dismissed the claims against the government of Guam on the ground that Guam was immune from suit under Guam's organic act, 48, U.S.C. § 1421a and the claims against the defendants in their official capacities on the ground that the suit against these officials was a suit against the government and thus barred by sovereign immunity.

[1] Guam enjoys only such powers as may be delegated to it by Congress in the Organic Act of 1950. It is in essence an instrumentality of the federal government. [2] The federal government bestows on Guam its powers and, unlike the states, which retain their sovereignty by virtue of the Constitution, Guam's sovereignty is entirely a creation of federal

*Honorable William P. Gray, Senior United States District Judge, Central District of California, sitting by designation.

statute. [3] In *Sakamoto*, this court found that Guam enjoys the same immumity from the antitrust laws as does the federal government. [4] Because *Sakamoto's* instruction that Guam is a creation of Congress and no more than an instrumentality of the federal government, Guam, like the federal government, is not a "person" chargeable with violating territorial law under section 1983. [5] A section 1983 suit against police officers in their individual capacities can be maintained unless the officers are immune. [6] Section 1421a is not a source of immunity because it does not apply to suits against individual government officials. [7] Police officers are entitled to qualified immunity from section 1983 suits. They may rely on the defenses of good faith and probable cause. [8] The court below never considered whether and to what extent the officers might enjoy good faith immunity from suit. Accordingly, the district court, on remand, must consider and resolve defendants' good faith immunity claims. [9] Plaintiffs filed suit two and a half years after the incident. Under Guam Civ. Proc. Code section 339, plaintiff must file within two years. [10] However, the incidents giving rise to the cause of action are alleged to have occurred more than two years before *Wilson*. [11] Before *Wilson*, a three year limitations period governed section 1983 suits. Accordingly, plaintiffs' complaint was timely.

COUNSEL

Jeffrey R. Siegel, Gill & Siegel, Agana, Guam, for the plaintiffs-appellants.

Patrick Mason, Assistant Attorney General, Government of Guam, Agana, Guam, for the defendants-appellees.

Barbara L. Herwig and Michael E. Robinson, United States Department of Justice, Washington, D.C., for the amicus.

OPINION

KOZINSKI, Circuit Judge:

We consider whether the district court properly dismissed appellants' federal civil rights claims against the Government of Guam, the Guam Police Department, the Director of the Department of Public Safety, and several Guam police officers acting in their individual and official capacities.

Facts

On March 31, 1983, appellants were picked up by Guam police on suspicion of having committed certain narcotics offenses. They were taken to police headquarters in Agana where the defendant police officers allegedly "harassed, threatened, intimidated and beat[ ]" them, and forced them to write and sign a statement confessing to the narcotics crimes. Appellants filed several claims alleging numerous constitutional violations and seeking damages under 42 U.S.C. §§ 1981, 1983, 1985 and 1986 (1982). On October 30, 1986, the district court dismissed all of the federal and pendent territorial law claims. *Ngiraingas* v. *Sanchez*, No. 85-0064 (D. Guam Oct. 30, 1986) ("Mem. Order"). It dismissed the claims against the government of Guam on the ground that Guam was immune from suit under Guam's organic act, 48 U.S.C. § 1421a (1982). Mem. Order at 3-4. The court dismissed the claims against the defendants in their official capacities on the ground that the suit against these officials was, insofar as "the relief sought would affect the public treasury," a suit against the government and thus barred by sovereign immunity. *Id.* at 4-5 (citing *Demery* v. *Kupperman*, 735 F.2d 1139 (9th Cir. 1984), *cert. denied sub nom. Rowland* v. *Demery*, 469 U.S. 1127 (1985)). Finally, it dismissed the claims against the officials in their individual capacities as time-barred. Mem. Order at 5-8.

Discussion

Appellants raise a number of civil rights claims, principally grounded in 42 U.S.C. § 1983 which, inter alia, proscribes the deprivation of constitutional rights by persons acting under color of territorial law. In addition to denying many of the factual allegations on which appellants' claims rest, the government of Guam denies that it may ever be held liable under section 1983, arguing, first, that it is not a "person" within the meaning of the statute and, second, that Guam is shielded from liability by 48 U.S.C. § 1421a. The individual defendants also claim immunity for actions taken in their official capacities. Several of the individual defendants argue that appellants' claims against them in their individual capacities are barred by the relevant statute of limitations. We consider each of these arguments in turn.

I. Guam's Amenability to Suit Under Section 1983

A. Section 1983 provides:

> Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (emphasis added). The term "person" has long been interpreted to include "legal as well as natural persons." *Monell* v. *Department of Social Servs.*, 436 U.S. 658, 683 (1978); *cf. Louisville, C. & C.R.R.* v. *Letson*, 43 U.S. (2 How.) 497, 558 (1844) ("a corporation created by and doing business in a particular state, is to be deemed for all intents and purposes as a person . . ."). But precisely which

legal persons are included within section 1983's scope has been the subject of much disagreement. *See generally* Note, *Developments in the Law — Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1191-97 (1977) (describing case law).

Monell held that local governments are "persons," reasoning that "there is no justification for excluding municipalities from the 'persons' covered by [section 1983]." 436 U.S. at 701. While the Court quoted portions of the legislative history suggesting that the members of the 42d Congress intended to include all "bodies politic" within the definition of person in section 1983, *id.* at 688 (quoting Act of Feb. 25, 1871, § 2, 16 Stat. 431), the Court did not reach the question of whether states, territories or other entities are persons under the statute. Accordingly, *Monell* stands only for the narrow proposition that municipalities and other local government units are persons for purposes of section 1983. *See City of St. Louis* v. *Praprotnik*, 108 S. Ct. 915, 922-23 (1988); *City of Oklahoma* v. *Tuttle*, 471 U.S. 808, 817-18 (1985). The relevant question after *Monell* is not whether an entity is among those bodies politic intended to be included in the Act, for the legislative history is, in that regard, inconclusive, *see* Note, 90 Harv. L. Rev. at 1192 ("the debates involved no explicit discussion of the definition of the word 'person' "), but rather whether "there is . . . justification for excluding [the entity] from the 'persons' covered by [section 1983]." 436 U.S. at 701. With this in mind, we turn our attention to Guam.

[1] **B.** Guam is an unincorporated territory whose status is governed by the Organic Act of 1950, 48 U.S.C.A. §§ 1421-1428e (1987). It "enjoy[s] only such powers as may be delegated to it by Congress in the Organic Act . . . ." *Sakamoto* v. *Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1286 (9th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986); *see also* Leibowitz, *The Applicability of Federal Law to Guam*, 16 Va. J. Int'l L. 21, 34 (1975) ("Guam has no power to act in the absence of a specific authorization from Congress"). As such, it "is in

essence an instrumentality of the federal government," *id.*, much like a federal department or administrative agency. *See United States* v. *Wheeler*, 435 U.S. 313, 320-21 (1978). Like an agency, it may administer its own affairs; it may draft laws of general applicability, select personnel, exact penalities and even create an entire infrastructure of government. But, also like an agency, its authority to administer itself and to set policy is derived from, and circumscribed by, Congress.

[2] Admittedly, the analogy between Guam and an administrative agency such as the Federal Trade Commission is counterintuitive. Guam seems more like a state or a municipality than a run-of-the-mill federal agency. After all, Guam elects government officials, its citizens participate politically and the territory enjoys many of the trappings of a sovereign governmental entity. *See* 48 U.S.C. §§ 1421-1428e. But there are also very significant differences, differences we deem conclusive for purposes of the question presented to us. Guam marches squarely to the beat of the federal drummer; the federal government bestows on Guam its powers and, unlike the states, which retain their sovereignty by virtue of the Constitution, Guam's sovereignty is entirely a creation of federal statute.

[3] In *Sakamoto*, we considered whether Guam enjoys the same immunity from the antitrust laws as does the federal government. Reasoning that "the government of Guam is an instrumentality of the federal government over which the federal government exercises plenary control" we concluded that "[t]here is no reason why Guam should enjoy less immunity than the federal government itself." 764 F.2d at 1289. While the issue in *Sakamoto* was immunity from antitrust suit, the principle — that Guam, like the federal government, should not be held liable on the same terms as other entities — is applicable in this context as well.

As a creature of the federal government, Guam stands in sharp contrast to "bodies politic" as that phrase is normally

understood. *See* Leibowitz, 16 Va. J. Int'l L. at 35 ("the government of Guam totally lacks the degree of local autonomy possessed by states or commonwealths within the federal system"). Unlike states, Guam has no sovereign status; it cannot create a system of laws and administration except by leave of Congress and, of course, the Constitution does not accord Guam or any other unincorporated territories independent sovereignty. *See, e.g.,* 48 U.S.C. § 1423i (Congress may annul any act of Guam legislature); *compare* U.S. Const. amends. X-XI *with id.* at art. IV, § 3. It is also not like a trust territory whose relationship with the United States government is as a commonwealth or a "free associate," administered by the United States pursuant a trusteeship agreement or covenant.[1]

[1]Guam's relationship with the United States government distinguishes this case from *Fleming* v. *Department of Public Safety,* amended slip op. 4445 (9th Cir. Apr. 8, 1988), where we held that the Commonwealth of the Northern Mariana Islands (CNMI) is a person for the purposes of section 1983. *Id.* at 4455. CNMI has a unique relationship with the United States; the original Trusteeship Agreement obligated the United States to "promote the development of the inhabitants of the trust territory toward self-government or independence;" *see* Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, art. 6, § 1, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189, *quoted in Fleming,* amended slip op. at 4449. Significantly, "the United States does not possess sovereignty over the Trust Territory" but merely "exercises powers of administration, legislation, and jurisdiction ... pursuant to an agreement with the United Nations." *United States* v. *Covington,* 783 F.2d 1052, 1055 (9th Cir. 1985), *cert. denied,* 107 S. Ct. 117 (1986); *Commonwealth of Northern Mariana Islands* v. *Atalig,* 723 F.2d 682, 684 (9th Cir.), *cert. denied,* 467 U.S. 1244 (1984). Guam's relation to the United States is entirely different. Guam has no separate sovereign status; unlike CNMI, it "is subject to the plenary power of Congress and has no inherent right to govern itself." *Atalig,* 723 F.2d at 687; *see also* Leibowitz, 16 Va. J. Int'l L. at 62-63 ("authority of the Guam government depends entirely upon the will of Congress, and is at all times subject to such alterations as Congress may see fit to adopt"); *cf. Barusch* v. *Calvo,* 685 F.2d 1199, 1202 (9th Cir. 1982) (distinguishing CNMI from Guam with respect to border searches).

Fleming does not state that Guam is a person or that *Bunyan* v. *Camacho,* 770 F.2d 773 (9th Cir. 1985), *cert. denied,* 477 U.S. 903 (1986), stands for that proposition. It says only that section 1983 is applicable in Guam, as well as in the several states. *See* amended slip op. at 4451 n.2. In its later discussion holding that the CNMI is a person, Guam is not mentioned.

[4] Because we are bound by *Sakamoto*'s instruction that Guam is "a creation of Congress" and no more than "an instrumentality of the federal government," 764 F.2d 1286, we conclude that Guam, like the federal government, is not a "person" chargeable with violating territorial law under section 1983.[2]

The same goes for the Guam Police Department, also a named defendant in this action. The police department is an instrumentality of the territory, deriving its powers from the Guam government and acting as its official law enforcement agency. Consequently, the Guam Police Department, like the government it serves, is not a person for section 1983 purposes.

II. Immunity

The district court dismissed the claims against the Government of Guam and against the individual defendants acting in their official capacities on the ground that the government and its officials are immune from suit under section 1983. Mem. Order at 3. Because we hold that Guam is not a person within the meaning of section 1983, we affirm the district court's dismissal of the claims against the territory, but do so without reaching the question of its putative immunity under section 1421a of Guam's Organic Act. We still must consider, however, whether the individual defendants enjoy immunity from suit, first as government officials and then as private individuals.

[2]Because we hold that Guam is not a "person" under section 1983, we need not consider whether Guam enjoys sovereign immunity pursuant to the eleventh amendment. *See Fleming,* amended slip op. at 4452-4455 & n.5.

A. We held above that the government of Guam is in all respects an instrumentality of the federal government and therefore not a person for the purposes of section 1983. For the same reasons, we hold that the individual defendants acting in their official capacities are not amenable to suit under section 1983.

Traditionally, officials have been liable or immune for acts committed in their official capacities to the same extent as has the governments they serve. *See Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 101-02 (1984); *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963). The Court in *Monell* explained that "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent" 436 U.S. at 690 n.55. Consequently, the Court has long held that a suit where the relief sought would affect the public treasury and public administration, is deemed to be a suit against the government itself. *See Pennhurst*, 465 U.S. at 101 & n.11; *Dugan*, 372 U.S. at 620.

Appellants' claims against Guam and the individual defendants in their official capacities are based principally on their allegation that the seven police officers acted pursuant to a "de facto policy" directed toward "summarily punish[ing] persons, including Plaintiffs, who refuse to obey orders, whether lawful or not, by means of excessive use of force, harassment, intimidation, violence and denial of basic civil and constitutional rights." Third Amended Complaint at ¶ 53.[3] Finding Guam's officials immune from suit, the district court did not reach the issue of whether such a de facto policy exists and, if so, whether it gives rise to a section 1983 claim. Because we hold that Guam is not a person under section

[3]We note that the Supreme Court has recently expressed skepticism about the type of "de facto policy" claim raised here, suggesting that "ad hoc searches for officials possessing such 'de facto' authority would serve primarily to foster needless unpredictability in the application of § 1983." *City of St. Louis* v. *Praprotnik*, 108 S. Ct. 915, 928 (1988).

1983, any claim that it authorized this egregious conduct as a matter of official policy would not be actionable. To the extent that Guam is not subject to suit under section 1983, neither are its officials acting under its tacit instruction.

[4] B. Having held that the claims against the government of Guam and against the individual defendants acting in their official capacities were properly dismissed, we now turn to the claims against the police officers in their individual capacities.[4] Such a suit can be maintained unless the officers are immune. We consider two possible sources of immunity: section 1421a of Guam's organic act of 1950, and general principles of immunity applicable to certain conduct of government officials.

1. Section 1421a provides that "[the] government of Guam . . . may be sued upon any contract entered into with respect to, or any tort committed incident to, the exercise by the government of Guam of any of its lawful powers." Appellees argue that, because the government has consented to suit in only a few narrow circumstances, it cannot be deemed to have consented to suit under section 1983.

[5] Section 1421a does not apply, however, to suits against individual government officials; it applies only to suits against "the government of Guam" and, perhaps, suits against individual government agents acting in their official capacities. *Cf.* Guam Gov't Code § 6500.02(1) (1983) (" 'Government of Guam' shall include all agencies, departments, instrumentalities, public corporations, and all other entities of the Government"). Appellees suggest that "government of Guam" must include employees of that government as well. This does not follow at all; reading section 1421a to exclude section 1983 suits against individual

[4]One other individual defendant, Judith P. Guthertz, was sued only "in her official capacity as . . . Director of the Department of Public Safety." Third Amended Complaint at ¶ 14.

employees makes perfect sense. Section 1983 embodies the notion that individuals acting under state or territorial law who violate the federal rights of others are acting without the imprimatur of the government. As we explained in *Demery* v. *Kupperman*, 735 F.2d at 1146:

> Section 1983 ... confers on [plaintiff] a cause of action at law against "[e]very person" who, under color of state law, subjects him to "the deprivation of any rights, privileges, or immunities secured [him] by the Constitution and laws." 42 U.S.C. § 1983 (1976). As the Supreme Court has emphasized, a state official who violates federal law "is in that case stripped of his official or representative character and is subjected *in his person* to the consequences of his individual conduct." *Scheuer* v. *Rhodes*, 416 U.S. 232, 237, 94 S.Ct. 1683, 1687, 40 L.Ed.2d 90 (1974) (quoting *Ex Parte Young*, 209 U.S. 123, 160, 28 S.Ct. 441, 454, 52 L.Ed. 714 (1908)). Accordingly, the Court has distinguished section 1983 claims from claims "seeking damages from the public treasury," *Scheuer*, 416 U.S. at 238, 94 S.Ct. at 1687.

See also Spruytte v. *Walters*, 753 F.2d 498, 511-14 (6th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986).

The Third Circuit construed a similar immunity provision in *Ocasio* v. *Bryan*, 374 F.2d 11 (3d Cir. 1967). *Ocasio* involved a civil rights suit against three Virgin Islands police officers. Defendants claimed sovereign immunity based on the Revised Organic Act of the Virgin Islands which, in language quite similar to section 1421a, provides:

> The government of the Virgin Islands ... shall have the right to sue by such name and in cases arising out of contract, to be sued: *Provided*, That no tort action shall be brought against the government of the Virgin Islands or against any officer or employee thereof in his official capacity without the consent of the legislature ...;

48 U.S.C. § 1541(b) (1982). The court held that this immunity provision "does not extend to a police officer who is sued for damages under the Civil Rights Act [for] in such cases recovery runs against him in his private capacity and not against the Government." 374 F.2d at 13. Similarly, we hold that section 1421a is inapplicable to this section 1983 suit against Guam's police officers in their individual capacities.

2. While section 1983 "creates a species of tort liability that on its face admits of no immunities," *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976), the statute's broad sweep has been narrowed by realistic applications of immunities "well grounded in history and reason." *Tenney* v. *Brandhove*, 341 U.S. 367, 376 (1951). In essence, the Supreme Court has instructed us that section 1983 "is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler*, 424 U.S. at 418; *see Malley* v. *Briggs*, 475 U.S. 335, 339-40 (1986).

[6] It is well settled that police officers are entitled to qualified immunity from section 1983 suits. *See, e.g., id.* at 340-41; *Pierson* v. *Ray*, 386 U.S. 547, 555-57 (1967); *Hamblen* v. *County of Los Angeles*, 803 F.2d 462, 465 (9th Cir. 1986); *Hutchinson* v. *Grant*, 796 F.2d 288, 290 (9th Cir. 1986). The principal case in the area is *Pierson*, where the Court considered a section 1983 claim brought against three Mississippi police officers on charges of false arrest and imprisonment. The Court held that "the defense of good faith and probable cause ... available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983." *Id.* at 557.[5]

[5]While *Pierson* involved a false arrest, we have held that a qualified immunity defense is also available where defendant is charged with illegal use of excessive force. *Peraza* v. *Delameter*, 722 F.2d 1455, 1457 (9th Cir. 1984); *see Hamblen*, 803 F.2d at 465.

The Court has warned against putting an officer of the law into a position where "he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Pierson*, 386 U.S. at 555. Accordingly, police officers "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); *accord Malley*, 475 U.S. at 340. On the other hand, police officers must not be given an impenetrable shield against the only weapon aggrieved plaintiffs have to vindicate the deprivation of their constitutional rights. *See id.* ("[t]he common law has never granted police officers an absolute and unqualified immunity"). Immunity remains the exception, not the rule. *See, e.g., id.* at 340 ("we do not assume that Congress intended to incorporate every common-law immunity into § 1983 in unaltered form"); *Butz* v. *Economou*, 438 U.S. 478, 506 (1978) (officers who claim immunity "must bear the burden of showing that public policy requires an exemption" from liability).

Deciding whether a police officer has acted in good faith is no easy task. As a general matter, however, we note that good faith immunity is judged "by an objective standard, not by examination of the subjective state of mind of the officer." *Hutchinson*, 796 F.2d at 290 (citing *Harlow*, 457 U.S. at 817-18). The relevant question is the one framed by the Third Circuit in *Deary* v. *Three Un-Named Police Officers*, 746 F.2d 185, 192 (3d Cir. 1984) (Virgin Islands): "[W]ould or should a reasonable person in the shoes of the individual police officer have known that he was violating another's . . . clearly established constitutional rights . . ."?

[7] This case is before us on a grant of summary judgment. The district court ruled in favor of defendants on the basis of section 1421a; consequently, the court never considered whether and to what extent the officers might enjoy good faith

immunity from suit. Moreover, we have no basis to decide, on the record before us, whether the officers here are entitled to good-faith immunity. Accordingly, we direct the district court, on remand, to consider and resolve defendants' good faith immunity claims.

III. Statute of Limitations

[8] The events giving rise to plaintiffs' claims allegedly occurred on March 31, 1983. Plaintiffs promptly sought administrative relief under Guam's tort claims act. The claims were denied on March 16, 1985, and plaintiffs filed suit in district court six months later, approximately two and a half years after the incident. Under Guam Civ. Proc. Code § 339 (1980), plaintiff must file any "action for assault, battery, false imprisonment . . . or for injury to, or for the death of, a person caused by the wrongful act or neglect of another" within two years from the time that the cause of action accrued. The district court held that plaintiffs' claims against the individual defendants acting in their individual capacity were barred by the two-year statute of limitations applicable to tort claims brought under section 1983. Mem. Order at 7. We disagree.

A. There is no federal statute of limitations applicable to section 1983 claims; therefore, we look to the most relevant state statute of limitations to determine whether the section 1983 claims were timely filed. 42 U.S.C. § 1988 (1982); *Wilson* v. *Garcia*, 471 U.S. 261, 266-68 (1985); *Board of Regents* v. *Tomanio*, 446 U.S. 478, 483-84 (1980); *De Luna* v. *Farris*, 841 F.2d 312, 314 (9th Cir. 1988); *Usher* v. *City of Los Angeles*, 828 F.2d 556, 558 (9th Cir. 1987). In *Wilson*, the Supreme Court cleared up the confusion surrounding which limitations periods apply to section 1983 claims, holding that the limitations period governing "tort action[s] for the recovery of damages for personal injuries is the best alternative available." 471 U.S. at 276.

[9] The incidents giving rise to the cause of action are alleged to have occurred more than two years before *Wilson*. The suit was not filed, however, until some five months after *Wilson*. Relying on *Wilson* and *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07 (1971), we have held that the applicable statute of limitations "shall be either (1) the pre-*Wilson* period, commencing at the time the cause of action arises, or (2) the post-*Wilson* period, commencing with the *Wilson* decision, whichever expires first." *Usher*, 828 F.2d at 561. The question, then, is what was the applicable limitations period in Guam before *Wilson*? If it was the two-year, personal injury statute of Guam Civ. Proc. Code 339, then plaintiffs' claims are barred; applying any of the other possible limitations periods, however, would render plaintiffs' claims timely.

[10] Before *Wilson*, we had consistently held that the three-year limitations period for "[a]n action upon a liability created by statute," governs section 1983 suits. *Mason* v. *Schaub*, 564 F.2d 308, 309 (9th Cir. 1977) (Nevada); *Strung* v. *Anderson*, 452 F.2d 632, 632-33 (9th Cir. 1971) (Montana); *Smith* v. *Cremins*, 308 F.2d 187, 189-90 (9th Cir. 1962) (California). While no case has considered the applicable limitations period in cases involving Guam, the rationale of these pre-*Wilson* cases applies comfortably to this unincorporated territory. Guam Civ. Proc. Code 338 (1970) provides that "[a]n action upon a liability created by law other than a penalty or forfeiture" must be filed within three years. Other than substituting "statute" for "law," California's three-year statute, Cal. Civ. Proc. Code § 338 (West 1982), is exactly the same. We hold that Guam's three-year period for actions "upon a liability created by law" applied to section 1983 claims before *Wilson* and therefore applies to these claims. Accordingly, we hold that the plaintiffs' complaint was timely, having been filed within the three-year period allowed by Guam Civ. Proc. Code 338.

IV. Pendent Territorial Law Claims

Having dismissed the federal claims, the district court also dismissed the pendent territorial law claims on the ground that "[a]bsent an independent basis of federal subject matter jurisdiction may not be exercised over pendent claims." Mem. Order at 10. With respect to those defendants as to whom we reinstate certain of the federal claims, we reverse the district court's dismissal of the pendent claims. *See United Mine Workers of Am.* v. *Gibbs*, 383 U.S. 715, 725-26 (1966). As to the remaining defendants, the district court has discretion whether or not to dismiss the pendent claims. *Id.* at 726-27. While the district court exercised its discretion to dismiss the claims on the assumption that the entire case would be dismissed, it might well decide the matter differently knowing that it will be retaining jurisdiction over the other defendants. On remand, the district court shall again exercise its discretion.

Conclusion

We affirm the district court's dismissal of the claims against the government of Guam on the ground that Guam is not a person within the meaning of 42 U.S.C. § 1983. For the same reasons, we affirm the district court's dismissal of the claims against the Guam Police Department. We affirm the district court's dismissal of the claims against the individual defendants in their official capacities but reverse as to the claims against the police officers in their individual capacities. On remand, the district court shall consider whether and to what extent the individual officers enjoy good faith immunity from suit. We also hold that plaintiffs' claims against the individual police officers are not barred by the statute of limitations. Finally, we reverse the district court's dismissal of the pendent territorial law claims.

AFFIRMED in part, **REVERSED** in part and **REMANDED** to the district court for partial reinstatement

of the complaint and for further proceedings consistent with this opinion. The parties shall bear their own costs on appeal.

Filed June 7, 1988
Amended September 28, 1988

Before: Alex Kozinski and David R. Thompson, Circuit Judges, and William P. Gray,* Senior District Judge.

Opinion by Judge Kozinski

SUMMARY

Civil Rights/Constitutional Law

Appeal from dismissal of suit. Affirmed in part, reversed in part and remanded. The court held that Guam is not a "person" for purposes of a section 1983 suit.

Appellants were picked up by Guam police on suspicion of committing certain narcotics offenses. Defendant police officers allegedly harrassed and beat appellants. Appellants sued seeking damages under 42 U.S.C. §§ 1981, 1983, 1985 and 1986. The district court dismissed the claims against the government of Guam on the ground that Guam was immune from suit under Guam's organic act, 48, U.S.C. § 1421a and the claims against the defendants in their official capacities on the ground that the suit against these officials was a suit against the government and thus barred by sovereign immunity.

[1] Guam enjoys only such powers as may be delegated to it by Congress in the Organic Act of 1950. It is in essence an instrumentality of the federal government. [2] The federal government bestows on Guam its powers and, unlike the states, which retain their sovereignty by virtue of the Consti-

*Honorable William P. Gray, Senior United States District Judge, Central District of California, sitting by designation.

tution, Guam's sovereignty is entirely a creation of federal statute. [3] In *Sakamoto*, this court found that Guam enjoys the same immunity from the antitrust laws as does the federal government. [4] Because *Sakamoto's* instruction that Guam is a creation of Congress and no more than an instrumentality of the federal government, Guam is not a "person" chargeable with violating territorial law under section 1983. [5] A section 1983 suit against police officers in their individual capacities can be maintained unless the officers are immune. [6] Section 1421a is not a source of immunity because it does not apply to suits against individual government officials. [7] Police officers are entitled to qualified immunity from section 1983 suits. They may rely on the defenses of good faith and probable cause. [8] The court below never considered whether and to what extent the officers might enjoy good faith immunity from suit. Accordingly, the district court, on remand, must consider and resolve defendants' good faith immunity claims. [9] Plaintiffs filed suit two and a half years after the incident. Under Guam Civ. Proc. Code section 339, plaintiff must file within two years. [10] However, the incidents giving rise to the cause of action are alleged to have occurred more than two years before *Wilson*. [11] Before *Wilson*, a three year limitations period governed section 1983 suits. Accordingly, plaintiffs' complaint was timely.

COUNSEL

Jeffrey R. Siegel, Gill & Siegel, Agana, Guam, for the plaintiffs-appellants.

Patrick Mason, Assistant Attorney General, Agana, Guam, for the defendants-appellees.

Barbara L. Herwig and Michael E. Robinson, United States Department of Justice, Washington, D.C., for the amicus.

ORDER

The opinion issued herein on June 7, 1988, is amended as follows: Delete the clause "like the federal government" appearing in the first paragraph, line four, on page 6681 of the slip opinion.

The petition for rehearing is denied. The full court has been advised of the suggestion for en banc rehearing and no judge has requested a vote thereon. The suggestion for rehearing en banc is therefore rejected. Fed. R. App. P. 35(b).

OPINION

KOZINSKI, Circuit Judge:

We consider whether the district court properly dismissed appellants' federal civil rights claims against the Government of Guam, the Guam Police Department, the Director of the Department of Public Safety, and several Guam police officers acting in their individual and official capacities.

Facts

On March 31, 1983, appellants were picked up by Guam police on suspicion of having committed certain narcotics offenses. They were taken to police headquarters in Agana where the defendant police officers allegedly "harassed, threatened, intimidated and beat[ ]" them, and forced them to write and sign a statement confessing to the narcotics crimes. Appellants filed several claims alleging numerous constitutional violations and seeking damages under 42 U.S.C. §§ 1981, 1983, 1985 and 1986 (1982). On October 30, 1986, the district court dismissed all of the federal and pendent territorial law claims. *Ngiraingas* v. *Sanchez*, No. 85-0064 (D. Guam Oct. 30, 1986) ("Mem. Order"). It dismissed

the claims against the government of Guam on the ground that Guam was immune from suit under Guam's organic act, 48 U.S.C. § 1421a (1982). Mem. Order at 3-4. The court dismissed the claims against the defendants in their official capacities on the ground that the suit against these officials was, insofar as "the relief sought would affect the public treasury," a suit against the government and thus barred by sovereign immunity. *Id.* at 4-5 (citing *Demery* v. *Kupperman*, 735 F.2d 1139 (9th Cir. 1984), *cert. denied sub nom. Rowland* v. *Demery*, 469 U.S. 1127 (1985)). Finally, it dismissed the claims against the officials in their individual capacities as time-barred. Mem. Order at 5-8.

Discussion

Appellants raise a number of civil rights claims, principally grounded in 42 U.S.C. § 1983 which, inter alia, proscribes the deprivation of constitutional rights by persons acting under color of territorial law. In addition to denying many of the factual allegations on which appellants' claims rest, the government of Guam denies that it may ever be held liable under section 1983, arguing, first, that it is not a "person" within the meaning of the statute and, second, that Guam is shielded from liability by 48 U.S.C. § 1421a. The individual defendants also claim immunity for actions taken in their official capacities. Several of the individual defendants argue that appellants' claims against them in their individual capacities are barred by the relevant statute of limitations. We consider each of these arguments in turn.

I. Guam's Amenability to Suit Under Section 1983

A. Section 1983 provides:

> Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (emphasis added). The term "person" has long been interpreted to include "legal as well as natural persons." *Monell* v. *Department of Social Servs.*, 436 U.S. 658, 683 (1978); *cf. Louisville, C. & C.R.R.* v. *Letson*, 43 U.S. (2 How.) 497, 558 (1844) ("a corporation created by and doing business in a particular state, is to be deemed for all intents and purposes as a person . . ."). But precisely which legal persons are included within section. 1983's scope has been the subject of much disagreement. *See generally* Note, *Developments in the Law — Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1191-97 (1977) (describing case law).

Monell held that local governments are "persons," reasoning that "there is no justification for excluding municipalities from the 'persons' covered by [section 1983]." 436 U.S. at 701. While the Court quoted portions of the legislative history suggesting that the members of the 42d Congress intended to include all "bodies politic" within the definition of person in section 1983, *id.* at 688 (quoting Act of Feb. 25, 1871, § 2, 16 Stat. 431), the Court did not reach the question of whether states, territories or other entities are persons under the statute. Accordingly, *Monell* stands only for the narrow proposition that municipalities and other local government units are persons for purposes of section 1983. *See City of St. Louis* v. *Praprotnik*, 108 S. Ct. 915, 922-23 (1988); *City of Oklahoma* v. *Tuttle*, 471 U.S. 808, 817-18 (1985). The relevant question after *Monell* is not whether an entity is among those bodies politic intended to be included in the Act, for the legislative history is, in that regard, inconclusive, *see* Note, 90 Harv. L. Rev. at 1192 ("the debates involved no explicit discussion of the definition of the word 'person' "), but rather whether "there is . . . justification for excluding [the

entity] from the 'persons' covered by [section 1983]." 436 U.S. at 701. With this in mind, we turn our attention to Guam.

[1] **B.** Guam is an unincorporated territory whose status is governed by the Organic Act of 1950, 48 U.S.C.A. §§ 1421-1428e (1987). It "enjoy[s] only such powers as may be delegated to it by Congress in the Organic Act . . . ." *Sakamoto* v. *Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1286 (9th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986); *see also* Leibowitz, *The Applicability of Federal Law to Guam*, 16 Va. J. Int'l L. 21, 34 (1975) ("Guam has no power to act in the absence of a specific authorization from Congress"). As such, it "is in essence an instrumentality of the federal government," *id.*, much like a federal department or administrative agency. *See United States* v. *Wheeler*, 435 U.S. 313, 320-21 (1978). Like an agency, it may administer its own affairs; it may draft laws of general applicability, select personnel, exact penalities and even create an entire infrastructure of government. But, also like an agency, its authority to administer itself and to set policy is derived from, and circumscribed by, Congress.

[2] Admittedly, the analogy between Guam and an administrative agency such as the Federal Trade Commission is counterintuitive. Guam seems more like a state or a municipality than a run-of-the-mill federal agency. After all, Guam elects government officials, its citizens participate politically and the territory enjoys many of the trappings of a sovereign governmental entity. *See* 48 U.S.C. §§ 1421-1428e. But there are also very significant differences, differences we deem conclusive for purposes of the question presented to us. Guam marches squarely to the beat of the federal drummer; the federal government bestows on Guam its powers and, unlike the states, which retain their sovereignty by virtue of the Constitution, Guam's sovereignty is entirely a creation of federal statute.

[3] In *Sakamoto*, we considered whether Guam enjoys the same immunity from the antitrust laws as does the federal

government. Reasoning that "the government of Guam is an instrumentality of the federal government over which the federal government exercises plenary control" we concluded that "[t]here is no reason why Guam should enjoy less immunity than the federal government itself." 764 F.2d at 1289. While the issue in *Sakamoto* was immunity from antitrust suit, the principle — that Guam, like the federal government, should not he held liable on the same terms as other entities — is applicable in this context as well.

As a creature of the federal government, Guam stands in sharp contrast to "bodies politic" as that phrase is normally understood. *See* Leibowitz, 16 Va. J. Int'l L. at 35 ("the government of Guam totally lacks the degree of local autonomy possessed by states or commonwealths within the federal system"). Unlike states, Guam has no sovereign status: it cannot create a system of laws and administration except by leave of Congress and, of course, the Constitution does not accord Guam or any other unincorporated territories independent sovereignty. *See, e.g.*, 48 U.S.C. § 1423i (Congress may annul any act of Guam legislature); *compare* U.S. Const. amends. X-XI *with id.* at art. IV, § 3. It is also not like a trust territory whose relationship with the United States government is as a commonwealth or a "free associate," administered by the United States pursuant a trusteeship agreement or covenant.[1]

[1]Guam's relationship with the United States government distinguishes this case from *Fleming* v. *Department of Public Safety*, amended slip op. 4445 (9th Cir. Apr. 8, 1988), where we held that the Commonwealth of the Northern Mariana Islands (CNMI) is a person for the purposes of section 1983. *Id.* at 4455. CNMI has a unique relationship with the United States; the original Trusteeship Agreement obligated the United States to "promote the development of the inhabitants of the trust territory toward self-government or independence;" *see* Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, art. 6, § 1, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189, *quoted in Fleming*, amended slip op. at 4449. Significantly, "the United States does not possess sovereignty over the Trust Territory" but merely "exercises powers of administration, legis-

[4] Because we are bound by *Sakamoto*'s instruction that Guam is "a creation of Congress" and no more than "an instrumentality of the federal government," 764 F.2d 1286, we conclude that Guam is not a "person" chargeable with violating territorial law under section 1983.[2]

The same goes for the Guam Police Department, also a named defendant in this action. The police department is an instrumentality of the territory, deriving its powers from the Guam government and acting as its official law enforcement agency. Consequently, the Guam Police Department, like the government it serves, is not a person for section 1983 purposes.

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lation, and jurisdiction ... pursuant to an agreement with the United Nations." *United States* v. *Covington*, 783 F.2d 1052, 1055 (9th Cir. 1985), *cert. denied*, 107 S. Ct. 117 (1986); *Commonwealth of Northern Mariana Islands* v. *Atalig*, 723 F.2d 682, 684 (9th Cir.), *cert. denied*, 467 U.S. 1244 (1984). Guam's relation to the United States is entirely different. Guam has no separate sovereign status; unlike CNMI, it "is subject to the plenary power of Congress and has no inherent right to govern itself." *Atalig*, 723 F.2d at 687; *see also* Leibowitz, 16 Va. J. Int'l L. at 62-63 ("authority of the Guam government depends entirely upon the will of Congress, and is at all times subject to such alterations as Congress may see fit to adopt"); *cf. Barusch* v. *Calvo*, 685 F.2d 1199, 1202 (9th Cir. 1982) (distinguishing CNMI from Guam with respect to border searches).

Fleming does not state that Guam is a person or that *Bunyan* v. *Camacho*, 770 F.2d 773 (9th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986), stands for that proposition. It says only that section 1983 is applicable in Guam, as well as in the several states. *See* amended slip op. at 4451 n.2. In its later discussion holding that the CNMI is a person, Guam is not mentioned.

[2]Because we hold that Guam is not a "person" under section 1983, we need not consider whether Guam enjoys sovereign immunity pursuant to the eleventh amendment. *See Fleming*, amended slip op. at 4452-4455 & n.5.

II. Immunity

The district court dismissed the claims against the Government of Guam and against the individual defendants acting in their official capacities on the ground that the government and its officials are immune from suit under section 1983. Mem. Order at 3. Because we hold that Guam is not a person within the meaning of section 1983, we affirm the district court's dismissal of the claims against the territory, but do so without reaching the question of its putative immunity under section 1421a of Guam's Organic Act. We still must consider, however, whether the individual defendants enjoy immunity from suit, first as government officials and then as private individuals.

A. We held above that the government of Guam is in all respects an instrumentality of the federal government and therefore not a person for the purposes of section 1983. For the same reasons, we hold that the individual defendants acting in their official capacities are not amenable to suit under section 1983.

Traditionally, officials have been liable or immune for acts committed in their official capacities to the same extent as has the governments they serve. *See Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 101-02 (1984); *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963). The Court in *Monell* explained that "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent" 436 U.S. at 690 n.55. Consequently, the Court has long held that a suit where the relief sought would affect the public treasury and public administration, is deemed to be a suit against the government itself. *See Pennhurst*, 465 U.S. at 101 & n.11; *Dugan*, 372 U.S. at 620.

Appellants' claims against Guam and the individual defendants in their official capacities are based principally on their allegation that the seven police officers acted pursuant to a

"de facto policy" directed toward "summarily punish[ing] persons, including Plaintiffs, who refuse to obey orders, whether lawful or not, by means of excessive use of force, harassment, intimidation, violence and denial of basic civil and constitutional rights." Third Amended Complaint at ¶ 53.[3] Finding Guam's officials immune from suit, the district court did not reach the issue of whether such a de facto policy exists and, if so, whether it gives rise to a section 1983 claim. Because we hold that Guam is not a person under section 1983, any claim that it authorized this egregious conduct as a matter of official policy would not be actionable. To the extent that Guam is not subject to suit under section 1983, neither are its officials acting under its tacit instruction.

[5] B. Having held that the claims against the government of Guam and against the individual defendants acting in their official capacities were properly dismissed, we now turn to the claims against the police officers in their individual capacities.[4] Such a suit can be maintained unless the officers are immune. We consider two possible sources of immunity: section 1421a of Guam's organic act of 1950, and general principles of immunity applicable to certain conduct of government officials.

1. Section 1421a provides that "[the] government of Guam . . . may be sued upon any contract entered into with respect to, or any tort committed incident to, the exercise by the government of Guam of any of its lawful powers." Appellees argue that, because the government has consented to suit in

[3]We note that the Supreme Court has recently expressed skepticism about the type of "de facto policy" claim raised here, suggesting that "ad hoc searches for officials possessing such 'de facto' authority would serve primarily to foster needless unpredictability in the application of § 1983." *City of St. Louis* v. *Praprotnik*, 108 S. Ct. 915, 928 (1988).

[4]One other individual defendant, Judith P. Guthertz, was sued only "in her official capacity as . . . Director of the Department of Public Safety." Third Amended Complaint at ¶ 14.

only a few narrow circumstances, it cannot be deemed to have consented to suit under section 1983.

[6] Section 1421a does not apply, however, to suits against individual government officials; it applies only to suits against "the government of Guam" and, perhaps, suits against individual government agents acting in their official capacities. *Cf.* Guam Gov't Code § 6500.02(1) (1983) (" 'Government of Guam' shall include all agencies, departments, instrumentalities, public corporations, and all other entities of the Government"). Appellees suggest that "government of Guam" must include employees of that government as well. This does not follow at all; reading section 1421a to exclude section 1983 suits against individual employees makes perfect sense. Section 1983 embodies the notion that individuals acting under state or territorial law who violate the federal rights of others are acting without the imprimatur of the government. As we explained in *Demery* v. *Kupperman*, 735 F.2d at 1146:

> Section 1983 . . . confers on [plaintiff] a cause of action at law against "[e]very person" who, under color of state law, subjects him to "the deprivation of any rights, privileges, or immunities secured [him] by the Constitution and laws." 42 U.S.C. § 1983 (1976). As the Supreme Court has emphasized, a state official who violates federal law "is in that case stripped of his official or representative character and is subjected *in his person* to the consequences of his individual conduct." *Scheuer* v. *Rhodes*, 416 U.S. 232, 237, 94 S.Ct. 1683, 1687, 40 L.Ed.2d 90 (1974) (quoting *Ex Parte Young*, 209 U.S. 123, 160, 28 S.Ct. 441, 454, 52 L.Ed. 714 (1908)). Accordingly, the Court has distinguished section 1983 claims from claims "seeking damages from the public treasury," *Scheuer*, 416 U.S. at 238, 94 S.Ct. at 1687.

See also Spruytte v. *Walters*, 753 F.2d 498, 511-14 (6th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986).

The Third Circuit construed a similar immunity provision in *Ocasio* v. *Bryan*, 374 F.2d 11 (3d Cir. 1967). *Ocasio* involved a civil rights suit against three Virgin Islands police officers. Defendants claimed sovereign immunity based on the Revised Organic Act of the Virgin Islands which, in language quite similar to section 1421a, provides:

> The government of the Virgin Islands . . . shall have the right to sue by such name and in cases arising out of contract, to be sued: *Provided*, That no tort action shall be brought against the government of the Virgin Islands or against any officer or employee thereof in his official capacity without the consent of the legislature . . . .

48 U.S.C. § 1541(b) (1982). The court held that this immunity provision "does not extend to a police officer who is sued for damages under the Civil Rights Act [for] in such cases recovery runs against him in his private capacity and not against the Government." 374 F.2d at 13. Similarly, we hold that section 1421a is inapplicable to this section 1983 suit against Guam's police officers in their individual capacities.

2. While section 1983 "creates a species of tort liability that on its face admits of no immunities," *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976), the statute's broad sweep has been narrowed by realistic applications of immunities "well grounded in history and reason." *Tenney* v. *Brandhove*, 341 U.S. 367, 376 (1951). In essence, the Supreme Court has instructed us that section 1983 "is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler*, 424 U.S. at 418; *see Malley* v. *Briggs*, 475 U.S. 335, 339-40 (1986).

[7] It is well settled that police officers are entitled to qualified immunity from section 1983 suits. *See, e.g., id.* at 340-41; *Pierson* v. *Ray*, 386 U.S. 547, 555-57 (1967); *Hamblen* v. *County of Los Angeles*, 803 F.2d 462, 465 (9th Cir. 1986); *Hutchinson* v. *Grant*, 796 F.2d 288, 290 (9th Cir. 1986). The principal case in the area is *Pierson*, where the Court considered a section 1983 claim brought against three Mississippi police officers on charges of false arrest and imprisonment. The Court held that "the defense of good faith and probable cause . . . available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983." *Id.* at 557.[3]

The Court has warned against putting an officer of the law into a position where "he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Pierson*, 386 U.S. at 555. Accordingly, police officers "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); *accord Malley*, 475 U.S. at 340. On the other hand, police officers must not be given an impenetrable shield against the only weapon aggrieved plaintiffs have to vindicate the deprivation of their constitutional rights. *See id.* ("[t]he common law has never granted police officers an absolute and unqualified immunity"). Immunity remains the exception, not the rule. *See, e.g., id.* at 340 ("we do not assume that Congress intended to incorporate every common-law immunity into § 1983 in unaltered form"); *Butz* v. *Economou*, 438 U.S. 478, 506 (1978) (officers who claim immunity "must bear the burden of showing that public policy requires an exemption" from liability).

[3] While *Pierson* involved a false arrest, we have held that a qualified immunity defense is also available where defendant is charged with illegal use of excessive force. *Peraza* v. *Delameter*, 722 F.2d 1455, 1457 (9th Cir. 1984); *see Hamblen*, 803 F.2d at 465.

Deciding whether a police officer has acted in good faith is no easy task. As a general matter, however, we note that good faith immunity is judged "by an objective standard, not by examination of the subjective state of mind of the officer." *Hutchinson*, 796 F.2d at 290 (citing *Harlow*, 457 U.S. at 817-18). The relevant question is the one framed by the Third Circuit in *Deary* v. *Three Un-Named Police Officers*, 746 F.2d 185, 192 (3d Cir. 1984) (Virgin Islands): "[W]ould or should a reasonable person in the shoes of the individual police officer have known that he was violating another's . . . clearly established constitutional rights . . ."?

[8] This case is before us on a grant of summary judgment. The district court ruled in favor of defendants on the basis of section 1421a; consequently, the court never considered whether and to what extent the officers might enjoy good faith immunity from suit. Moreover, we have no basis to decide, on the record before us, whether the officers here are entitled to good-faith immunity. Accordingly, we direct the district court, on remand, to consider and resolve defendants' good faith immunity claims.

III. Statute of Limitations

[9] The events giving rise to plaintiffs' claims allegedly occurred on March 31, 1983. Plaintiffs promptly sought administrative relief under Guam's tort claims act. The claims were denied on March 16, 1985, and plaintiffs filed suit in district court six months later, approximately two and a half years after the incident. Under Guam Civ. Proc. Code § 339 (1980), plaintiff must file any "action for assault, battery, false imprisonment . . . or for injury to, or for the death of, a person caused by the wrongful act or neglect of another" within two years from the time that the cause of action accrued. The district court held that plaintiffs' claims against the individual defendants acting in their individual capacity were barred by the two-year statute of limitations applicable to tort claims brought under section 1983. Mem. Order at 7. We disagree.

A. There is no federal statute of limitations applicable to section 1983 claims; therefore, we look to the most relevant state statute of limitations to determine whether the section 1983 claims were timely filed. 42 U.S.C. § 1988 (1982); *Wilson* v. *Garcia*, 471 U.S. 261, 266-68 (1985); *Board of Regents* v. *Tomanio*, 446 U.S. 478, 483-84 (1980); *De Luna* v. *Farris*, 841 F.2d 312, 314 (9th Cir. 1988); *Usher* v. *City of Los Angeles*, 828 F.2d 556, 558 (9th Cir. 1987). In *Wilson*, the Supreme Court cleared up the confusion surrounding which limitations periods apply to section 1983 claims, holding that the limitations period governing "tort action[s] for the recovery of damages for personal injuries is the best alternative available." 471 U.S. at 276.

[10] The incidents giving rise to the cause of action are alleged to have occurred more than two years before *Wilson*. The suit was not filed, however, until some five months after *Wilson*. Relying on *Wilson* and *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07 (1971), we have held that the applicable statute of limitations "shall be either (1) the pre-*Wilson* period, commencing at the time the cause of action arises, or (2) the post-*Wilson* period, commencing with the *Wilson* decision, whichever expires first." *Usher*, 828 F.2d at 561. The question, then, is what was the applicable limitations period in Guam before *Wilson*? If it was the two-year, personal injury statute of Guam Civ. Proc. Code 339, then plaintiffs' claims are barred; applying any of the other possible limitations periods, however, would render plaintiffs' claims timely.

[11] Before *Wilson*, we had consistently held that the three-year limitations period for "[a]n action upon a liability created by statute," governs section 1983 suits. *Mason* v. *Schaub*, 564 F.2d 308, 309 (9th Cir. 1977) (Nevada); *Strung* v. *Anderson*, 452 F.2d 632, 632-33 (9th Cir. 1971) (Montana);

Smith v. *Cremins*, 308 F.2d 187, 189-90 (9th Cir. 1962) (California). While no case has considered the applicable limitations period in cases involving Guam, the rationale of these pre-*Wilson* cases applies comfortably to this unincorporated territory. Guam Civ. Proc. Code 338 (1970) provides that "[a]n action upon a liability created by law other than a penalty or forfeiture" must be filed within three years. Other than substituting "statute" for "law," California's three-year statute, Cal. Civ. Proc. Code § 338 (West 1982), is exactly the same. We hold that Guam's three-year period for actions "upon a liability created by law" applied to section 1983 claims before *Wilson* and therefore applies to these claims. Accordingly, we hold that the plaintiffs' complaint was timely, having been filed within the three-year period allowed by Guam Civ. Proc. Code 338.

IV. Pendent Territorial Law Claims

Having dismissed the federal claims, the district court also dismissed the pendent territorial law claims on the ground that "[a]bsent an independent basis of federal subject matter jurisdiction may not be exercised over pendent claims." Mem. Order at 10. With respect to those defendants as to whom we reinstate certain of the federal claims, we reverse the district court's dismissal of the pendent claims. *See United Mine Workers of Am.* v. *Gibbs*, 383 U.S. 715, 725-26 (1966). As to the remaining defendants, the district court has discretion whether or not to dismiss the pendent claims. *Id.* at 726-27. While the district court exercised its discretion to dismiss the claims on the assumption that the entire case would be dismissed, it might well decide the matter differently knowing that it will be retaining jurisdiction over the other defendants. On remand, the district court shall again exercise its discretion.

Conclusion

We affirm the district court's dismissal of the claims against the government of Guam on the ground that Guam is not a person within the meaning of 42 U.S.C. § 1983. For the same reasons, we affirm the district court's dismissal of the claims against the Guam Police Department. We affirm the district court's dismissal of the claims against the individual defendants in their official capacities but reverse as to the claims against the police officers in their individual capacities. On remand, the district court shall consider whether and to what extent the individual officers enjoy good faith immunity from suit. We also hold that plaintiffs' claims against the individual police officers are not barred by the statute of limitations. Finally, we reverse the district court's dismissal of the pendent territorial law claims.

AFFIRMED in part, **REVERSED** in part and **REMANDED** to the district court for partial reinstatement of the complaint and for further proceedings consistent with this opinion. The parties shall bear their own costs on appeal.

OPPOSITION

BRIEF

88-1281

Supreme Court, U.S.
FILED
JAN 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1988

ALEX NGIRAINGAS, OSCAR ONGKLUNGEL, JIMMY MOSES ARTHUR MECHOL, JONAS NGEHEED and BOLANDIS NGIRAINGAS

Petitioners,

v.

FRANCISCO Q. SANCHEZ, individually and as a Police Officer, JOSEPH R. CRUZ, individually and as a Police Officer, JOSE T. TERLAJE, individually and as a Police Officer, JOE P. BALAJADIA, individually and as a Police Officer, ELMER F. SARDOMA, individually and as a Police Officer, JOSEPH A. SAN NICOLAS, individually and as a Police Officer, JUDITH P. GUTHERTZ, in her Official Capacity as Director of the Department of Public Safety (Guam Police Department), THE GUAM POLICE DEPARTMENT AND THE GOVERNMENT OF GUAM,

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ON WRIT OF CERTIORARI
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RESPONDENT'S BRIEF IN OPPOSITION

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STATUTE INVOLVED

The statute to be interpreted by this Court is 42 USC Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

STATEMENT OF THE CASE

On March 31, 1983, plaintiffs were arrested by the Guam Police for certain narcotic offenses. Plaintiffs were taken to police headquarters where they allege certain police officers, harassed, threatened and assaulted them.

Plaintiffs filed claims in the District Court of Guam against the Government of Guam and six police officers indivi-

dually seeking fifty million dollars compensatory damages and fifty million dollars punitive damages. The District Court granted defendants' motion to dismiss on the grounds that the government of Guam was immune from suit and the statute of limitations barred the suit against the individual defendants.

Plaintiffs appealed to the United States Court of Appeals for the Ninth Circuit. On appeal, at the request of the Court, the United States filed a brief as amicus curiae. This brief supported the position of the government of Guam on immunity. On June 7, 1988, the Ninth Circuit affirmed the District Court's dismissal of the claims against the government of Guam on the grounds that Guam is not a person within the meaning of 42 U.S.C. §1983. The Court also held that the claims against the individual police officers were not barred by the statute of

limitations, reversing and remanding these claims for further proceedings. The claims against the individual police officers are now pending before the District Court. The plaintiffs filed a petition for rehearing En Banc. This petition was denied.

On September 28, 1988 the Ninth Circuit issued an Order and Amended Opinion which was substantially the same as its earlier opinion.

Plaintiffs then filed their petition for Writ of Certiorari asking this Court to review the Ninth Circuit's opinion affirming the District Court's dismissal of the claims against the government of Guam.

ARGUMENT

The government of the unincorporated Territory of Guam is not subject to a suit for damages under 42 U.S.C. §1983. The courts which have addressed the issue have

stated that territories are not "persons" within the meaning of 42 U.S.C. §1983. Ngiraingas v. Sanchez, Amended Slip Opinion and Order, filed June 7, 1988, Amended Septemb r 28, 1988 (The case now on petition for a Writ of Certiorari); Martinez v. Commonwealth of Puerto Rico, 435 F. Supp. 1204, 1208 (D.C.P.R. 1977); Keystone Col. Serv., Inc. v. Commonwealth of Puerto Rico, 388 F. Supp. 304 (D.C.P.R. 1974); and Ocasio v. Bryan, 374 F.2d 11, 13 (3rd Cir. 1967).

Plaintiffs begin their argument and rely extensively on Monell v. Department of Social Services of City of New York, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978). Monell, with two dissents and two concurring opinions, overruled Monroe v. Pape, 365 U.S. 167, 5 L.Ed.2d 492, 81 S.Ct. 473 (1961) and held that local governments, such as cities and

counties, could be sued for monetary damages under 42 U.S.C. §1983.

However there are important distinctions between municipalities and territories. In Monell, this Court cites specific references to cities during the debate over section 1 of the Civil Rights Act of 1871.

> Representative Bingham, for example, in discussing §1 of the bill, explained that he had drafted §1 of the Fourteenth Amendment with the case of Barron v. Mayor of Baltimore, 7 Pet. 243, 8 L.Ed. 672 (1833), especially in mind. "In [that] case the city had taken private property for public use, without compensation . . . and there was no redress for the wrong . . ." Globe App. 84 (emphasis added). Bingham's further remarks clearly indicate his view that such takings by cities, as had occurred in Barron, would be redressable under §1 of the bill. See Globe App. 85. [Monell, 436 U.S. at 686-7.]

Plaintiffs cite no such references to territories.

In 1871 municipal corporations had no tradition of immunity. Local governments were routinely sued for damages in both state and federal court. Monell, supra, 436 U.S. at 688. This, however, was not true for territories. Deriving their immunity from the Federal Government, territories were more akin to states. They could not be sued without consent by law. Territory of Wisconsin v. Doty, 1 Pinney (Wis.) 396 (1844); Langford v. King, 1 Mont. 33 (1868). Thus when the Civil Rights Act of 1871 was passed, territorial governments were viewed differently from cities on the question of immunity.

Guam did not become a United States territory until the Treaty of Paris with Spain in 1898. Since that time the governing body of Guam, unlike a municipality, has been under the control of the Federal Government. Prior to the

1950 Organic Act of Guam, the territory was administered by the Department of the Navy. 48 U.S.C.A. §1421, Transfer of Administration of Guam, p. 595. Consequently, a suit against the governing authority of Guam would have been a suit against the Department of the Navy. In 1950, the administration of Guam was transferred to the Department of Interior. At the time of transfer, Guam's Organic Act came into effect. 48 U.S.C.A. §1421, Transfer of Administration of Guam, p. 595. The Organic Act, a federal law, established the government of Guam:

> Guam is declared to be an unincorporated territory of the United States and the capital and seat of the government thereof shall be located at the city of Agana, Guam. The government of Guam shall have the powers set forth in this chapter and shall have power to sue by such name. The government of Guam shall consist of three branches, executive, legislative and judicial, and its relations with the Federal Government shall be under the

> general administrative supervision of the head of such civilian department or agency of the Government of the United States as the President may direct.
> Aug. 1, 1950, c. 512, §3, 64 Stat. 384. (Prior to amendment).

The new government of Guam was then and is now under the plenary control of Congress. Any law passed by Guam's Legislature can be annulled by Congress.

* * *

> All laws enacted by the Legislature shall be reported by the Governor to the head of the department or agency designated by the President under section 1421a of this title. The Congress of the United States reserves the power and authority to annul the same. [48 U.S.C. §1423i.]

The Inspector General of the Department of Interior has the authority to audit all accounts pertaining to revenue and receipts and bond issues of the government of Guam. 48 U.S.C. §1422d.

In 1959, Congress amended 48 U.S.C. §1421a to permit the government of Guam,

with the consent of its Legislature evidenced by enacted law, to be sued in tort and contract. 48 U.S.C.A. §1421a. As explained in a letter from the Assistant Secretary of the Interior incorporated in the House and Senate Reports accompanying the amendment, the amendment "enables the Legislature of Guam to waive the sovereign immunity which was conferred upon the government of Guam by Congress through enactment of the Guam Organic Act when, in the legislature's opinion, the best interests of both the people and government of Guam would be served by allowing such an action to be brought." House Report, 214, 86th Cong., 1st Sess. at 2 (1959); Senate Report 969, 86th Cong., 1st Sess. at 2 (1959). (emphasis added).

Consistent with the language and intent of the Organic Act both before and after the 1959 amendment, the courts have

respected the government of Guam's immunity. Crain v. Government of Guam, 195 F.2d 414 (9th Cir. 1952); Munoz v. Government of Guam, 625 F.2d 257 (9th Cir. 1980).

Thus the traditional immunity of territorial governments, when the 1871 Civil Rights Act was enacted, and the intent of Congress in the Organic Act, to insulate Guam from suit without its consent, distinguish the government of Guam from a municipality. This in turn distinguishes the Monell case, supra, from the Ninth Circuit holding in Ngirangas, supra.

Citing Carter v. District of Columbia, 795 F.2d 116 (D.C. Cir. 1986), plaintiffs state that the District of Columbia is amenable to suit under section 1983. Based on this they argue that the District of Columbia is similar to the Territory of Guam; therefore Guam is also

amenable to section 1983 suits. Plaintiffs' argument, however, ignores this Court's holding in Kawananakoa v. Polyblank, 205 U.S. 349, 27 S.Ct. 526 (1907). The Court said:

> In aid of their [appellants] contention they argue that the territory of Hawaii is liable to suit like a municipal corporation, irrespective of the permission given by its statutes, which does not extend to this case. They liken the territory to the District of Columbia. [205 U.S. at 352]

***

> The District of Columbia is different, because there the body of private rights is created and controlled by Congress, and not by a Legislature of the District. But for the territory of Hawaii it is enough to refer to the organic act. [205 U.S. 354]

In addition the Court in Carter, supra, did not analyze the issue of whether the District of Columbia is analogous to New York City (New York being the municipality that was sued in

Monell). The Court upheld the District Court's directed verdict in favor of the District of Columbia on the grounds that the evidence was not sufficient to show a custom or policy of civil rights violations.

Citing Harris v. Boreham, 233 F.2d 110 (3rd Cir. 1956), plaintiffs contend there is a distinct difference in the holdings of the Ninth Circuit and the Third Circuit. In Harris, the Court found that the United States was not liable for injuries sustained by a pedestrian who fell into a manhole on the island of St. Thomas in the territory of the Virgin Islands. The Virgin Islands, like Guam, has a territorial government established by Congressional legislation. This case held that the United States Government is not liable for damages due to the negligence of officials of the government of the Virgin Islands. The case did not

address the question of territorial immunity from section 1983.

There is in fact no dispute between the Third Circuit and the Ninth Circuit on this issue as pointed out by plaintiffs in their Petition. (page 26, Petition for Cert.) In Ocasio v. Bryan, 374 F.2d 11, 13 (3rd Cir. 1967), the Third Circuit did not directly decide the issue, but viewed the argument that one could sue the government of the Virgin Islands under the Civil Rights Act as weak. The Court said: "We need not consider the merits of so attenuated an indication of legislative intention..." 374 F.2d at 13. Granted Ocasio was decided before Monell had overruled Monroe. However, given the clear distinction between territories and cities, there is no reason to think the Third Circuit would now change its mind. There is no conflict between the Third

Circuit and the Ninth Circuit on this issue.

The Ninth Circuit has not taken an inconsistent position in Fleming v. Department of Public Saftey, 837 F.2d 401 (9th Cir. 1988). The Court points out the distinction between the relationship of the United States Government with Guam and with the Commonwealth of the Northern Marianas Islands (CNMI). Ngirangas, supra, at 12200 fn. 1. The CNMI, unlike Guam, has separate sovereign status. It is not subject to the plenary power of Congress. Therefore in negotiating its covenant with the United States, it could waive its sovereign immunity from section 1983. The court held in Fleming that the CNMI did so waive its immunity.

CONCLUSION

There is no conflict on this issue between the Ninth Circuit and this Court or between the Ninth Circuit and other

courts or between different Ninth Circuit opinions. The courts that have ruled on the issue have held that territorial governments are not "persons" within the meaning of section 1983. The Ninth Circuit opinion is based on sound precedent and sound reasoning. Therefore certiorari should be denied.

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REPLY

BRIEF

Case No. 88-1281

Supreme Court, U.S.
FILED
FEB 17 1989
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IN THE

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT,

PETITIONERS' REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE DECISIONS OF THE THIRD CIRCUIT AND THE NINTH CIRCUIT ARE IN DIRECT CONFLICT CONCERNING WHETHER AN UNINCORPORATED TERRITORY IS LIABLE UNDER SECTION 1983.

The Government of Guam argued in its Opposition that there is no conflict between the circuits. However, in Frett v. Government of the Virgin Islands, 839 F.2d 986 (3rd Cir. 1988), the Third Circuit held that the Unincorporated Territory of the Virgin Islands was liable under Section 1983.

In Frett, the plaintiffs sued the Government of the Virgin Islands and various prison officials for injuries which occurred at the Golden Grove Correctional Institute in Saint Croix, United States Virgin Islands, as a result of a stabbing by a fellow inmate. The plaintiffs alleged that the Governor of the U.S. Virgin Islands,

Commissioner of Public Safety and Director of Prison Institutions promulgated Rules and Regulations for the Bureau of Corrections in Saint Croix which resulted in egregious failure to protect plaintiffs and other inmates, 839 F.2d at p.971, and that the corrections officers established a custom of failing to assist and protect inmates in order to safeguard their health and safety. Id. One of the plaintiffs, Clinton David, took the case to trial, and the jury returned a verdict of joint and several liability for $500,000.00 compensatory damages. The defendants moved for judgment notwithstanding the verdict, or a new trial, which was denied. A remittur of $200,000.00 was accepted by the plaintiff. The Government of the

Virgin Islands's liability is limited by territorial law to $25,000.00 liability. In upholding the award against the Virgin Islands, under Section 1983, the Court stated:

> In Ocasio v. Bryan, 374 F.2d at 11, this Court rejected the contention that the enactment of Section 2(b) of the Organic Act was a pro tonto repeal of the Civil Rights Act of 1871, holding that the Organic Act's reference to suits 'against any officer or employee thereof in his official capacity' refers to only 'official capacity' suits. Prior to Ocasio v. Bryan, the Government of the Virgin Islands probably could not have been sued in a Section 1983 action. See, Monroe v. Pape, 365 US 167, 187, 81 S.Ct. 473, 484, 5 L.Ed.2d 492, (1961) (Governmental entity not a person within the meaning of Section 1983). This statute was reinterpreted in Monell v. Department of Social Services of the City of New York, 436 US 568, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). See also

Owen v. City of Independence, 445 US 622, 647-648, 100 S.Ct. 1398, 1413-1414, 63 L.Ed.2d 673 (1980); Maine v. Thiboutot, 448 US 1 100 S.Ct. 2502, 65 L.Ed.2d. 555 (1980).

Prior to trial, the Government of the Virgin Islands sought a ruling that under Section 1983, its liability in tort was restricted to that consented to under the Tort Claims Act. (Footnote). The Government made this same contention in a post trial motion, pursuant to Federal Rule of Civil Procedure 60(b). The District Court rejected it, holding that the Government of the Virgin Islands was subject to the same liability in tort under Section 1983 as any other governmental entity. The government renews that argument here. We hold that it was properly rejected. While Ocasio v. Bryan is technically not dispositive, that Court's interpretation of Section 2(b) of the Organic Act which it announced, permitting the application of Section 1983 in the Virgin Islands, is strongly suggestive. Attributing to the 1954 Congress, which passed the Organic Act, an intention to

confer on the Government of the Virgin Islands an immunity from tort actions based on the Constitution and laws of the United States greater than that enjoyed by the states and their subdivisions would be inconsistent with Section 1983 purposes. See, Moorehead v. Government of the Virgin Islands, 19 VI 453 (D.Ct. VI 1983) (Compliance with the Virgin Islands Tort Claims Act is not a prerequisite to suits against the Government). Frett v. Government of the Virgin Islands, 839 F.2d 968 at p.977.

Both the Virgin Islands and the Territory of Guam are unincorporated territories, and there is no reason to distinguish between them for the purpose of Section 1983.

Dated this 10th day of February, 1989.

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REPLY

BRIEF

Supreme Court, U.S.
FILED
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Case No. 88-1281

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INTRODUCTION

The United States has filed its Amicus Brief pursuant to the invitation of this Court. Subsequent to initial briefing, this Court decided Will v. Michigan Department of State Police, 109 S.Ct. 2304 (1989). Because the Petitioners did not have the opportunity to comment upon the application of Will, Petitioners shall do so by way of this Reply.

DISCUSSION

Although Amicus has "difficulty" with the Ninth Circuit's Decision in this case, it argues that the Decision is "strongly supported" by Will v. Michigan Department of State Police, Supra. (Amicus, pp.7, 9). Amicus acknowledges that Will is limited to "States or governmental entities that

are considered 'arms of the State' for Eleventh Amendment purposes," 109 S.Ct. at 2311, (Amicus, p.8), and that the Territory of Guam does not fall within this limitation. Amicus attempts to employ the factors relied upon by this Court in Will in holding that States are not persons under Section 1983 to draw the conclusion that Territories are not persons. However, as Justice Brennan points out in his dissent in Will, "the Eleventh Amendment lurks everywhere" 109 S.Ct. at 2312, as it does Amicus's Opposition.

Although the Court noted in Will that the question whether States are "persons" under Section 1983 is squarely before it because "the Eleventh Amendment does not apply in state courts" 109 S.Ct. at 2307, this Court relied upon the existence of the

Eleventh Amendment to discern legislative intent with respect to the word "person." The rules of construction which this Court applied in Will, in the majority of instances, used the Eleventh Amendment to demonstrate the lack of intent to create a Federal remedy for a State's deprivations of Civil Rights. However, there can be no question that the Eleventh Amendment should not enter the analysis at all when determining whether Territories are "persons" under Section 1983. There is no Constitutional immunity similar to the Eleventh Amendment providing protection to a Territory in Federal court. Indeed, it would be anomalous for this Court to hold that a Territory, which is not a State for the purposes of the Fourteenth Amendment, which Section

1983 was designed to enforce, (District of Columbia v. Carter, 109 U.S. 418, 423-425 and note 11, (1973); Amicus Brief, p.8), and which is under the plenary control of the Congress by virtue of the Territories clause of the Constitution, (Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285 (9th Cir. 1985), First National Bank of Brunswick Maine v. County of Yankton, 25 L.Ed. 1046, 1047 (1880)), is to be accorded an immunity commensurate with that of the several States. If Territories, mere "instrumentalities" of the Federal government (Sakamoto, Supra), are the only other political entities in this nation to be accorded immunity, or are held to be outside the scope of Section 1983, then Federalism means little. It is not intellectually reconcilable to hold that States are outside the scope

of Section 1983 because of their special place in the Federalist system and their high degree of sovereignty, and to hold that Territories are not subject to Section 1983 actions for damages because they hold no such place in our Federalist system, and have no independent sovereignty.

In reaching its holding that the States are not "persons" for Section 1983 purposes, this Court relied on seven considerations. Amicus has listed them in note 6 and each will be considered in turn.

First, the Court stated:

> We observe initially that if a state is a 'person' within the meaning of Section 1983, this section is to be read as saying that 'every person, including a state, who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects...' That

> would be a decidedly awkward way of expressing an intent to subject the States to liability... 109 S.Ct. at 2308.

Amicus states:

> It is just as awkward to describe a 'Territory' as acting 'under color of 'its own law as to describe a State in those terms. (Amicus, p.9).

But the Court continues:

> This approach is particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before. 109 S.Ct. at 2308.

However, that consideration is inapplicable here, where we are considering Territories. Since this rule is no longer "particularly applicable," it is no more awkward to read Section 1983 to say that "every person, including the District of Columbia (or including a Territory, or

including a Municipality), who, under color of any statute subjects..." Indeed, the District of Columbia is liable under Section 1983, Carter v. District of Columbia, 795 F.2d 116 (D.C. Cir. 1986), as is the unincorporated Territory of the Virgin Islands, Frett v. Government of Virgin Islands, 839 F.2d 968, (1988), and as is the Commonwealth of the Northern Marianas Islands. Fleming v. Department of Public Safety, 837 F.2d 401 cert. den. 109 S.Ct. 222 (1988). It is awkward to hold that a Territory is not a person, and the District of Columbia is a person, when both are mentioned in the same clause of Section 1983.

Second, this Court indicated that "the language of Section 1983 also falls far short of satisfying the

ordinary rule of statutory construction that if Congress intends to alter the 'usual Constitutional balance between the States and the Federal government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' (Citation)." 109 S.Ct. at 2308. No such Constitutional balance is at issue with respect to Territories, and therefore this consideration is inapplicable.

Third, this Court noted that the conclusion that a State is not a person within the meaning of Section 1983 is "reinforced by Congress's purpose in enacting the statute." 109 S.Ct. at 2309. Since "Congress assigned to the Federal courts a paramount role" Id., to remedy Constitutional deprivations, and the Eleventh Amendment barred such damage suits in Federal court, the

Congress would not have intended "to create a cause of action against States to be brought in State courts." Id. Again, this consideration is inapplicable since a Territory would have no protection under the Eleventh Amendment. Additionally, this Court notes that "in deciphering Congressional intent as to the scope of Section 1983, the scope of the Eleventh Amendment is a consideration, and we decline to adopt a reading of Section 1983 that disregards it." 109 S.Ct. at 2309. This, too, has no place in any analysis for Territories.

Fourth, the Court reasons:

> Our conclusion is further supported by our holdings that in enacting Section 1983, Congress did not intend to override well established immunities or defenses under the common law. 109 S.Ct. at 2309.

Amicus relies strongly on this reasoning, and cites extensively in note 7 from Kawananakoa v. Polyblank, 205 US 349 (1907). However, it is important to note that the cases relied upon by Amicus, and this Court, are cases arising under State, local or Territorial law. This is acknowledged by Amicus. In quoting from Polyblank, Amicus and Justice Holmes note:

> A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends...Kawananakoa v. Polyblank, 27 S.Ct. at 527, 205 US at 353.

Petitioners seek to hold the Territory of Guam liable not under Territorial law, but under Federal law. Therefore, "the logical and practical ground that there can be no legal right

as against the authority that makes the law on which the right depends," is inapplicable. There is no "logical or practical ground" to hold the Territory harmless from action created by Federal law to enforce the Constitution of the United States, or to hold the Territory immune from legislation passed by its plenary authority, i.e. Congress. There is no tradition of immunity of Territories from Federal law. In fact, the tradition is precisely opposite, and indeed Constitutionally mandated by the Territories clause.

Pursuant to the Fourteenth Amendment, Congress can override Eleventh Amendment immunity, and sovereign immunity, simply by passing legislation. Fitzpatrick v. Bitzer, 427 US 445, 96 S.Ct. 2666 (1976). If Territories had immunity, it was

abrogated by the enactment of Section 1983, just as it was for Municipalities.

> More fundamentally, however, the municipalities 'governmental' immunity is obviously abrogated by the sovereign's enactment of a statute making it amenable to suit. Section 1983 was just such a statute. By including municipalities within the class of 'persons' subject to liability for violations of the Federal Constitution and laws, Congress -- the supreme sovereign on matters of Federal law -- abolished whatever vestige of the state's sovereign immunity the municipalities possessed. Owen v. City of Independence, 445 US 622, 647-648, (1980).

An assertion of sovereign immunity by a municipality to a Federal right of action is controlled by Federal law. (Id. n.30). Congress would not intend to provide an action for Civil Rights, and later establish immunity, by implication, by passing an

Organic Act.

> It is difficult to believe that in adopting what in effect is the constitution of the Virgin Islands, the same Congress which provided a Bill of Rights taken from the Constitution of the United States would have intended at the same time silently to work the repeal of the Civil Rights Act of 1871. Ocasio v. Brian, 374 F.2d. 11, 13-14 (3rd Cir. 1967).

The issue is not, therefore, fairly characterized as whether sovereign immunity exists for the Territory of Guam. It is properly characterized as whether Congress intended to repeal the operation of Section 1983 by passing the Organic Act, and raising sovereign immunity to a Federal right of action.

It is proper to pause at this point and draw a general conclusion. Given this Court's interpretation of the word "person" as used in Section

1983, and the great breadth of its scope as set forth in Monnell v. New York City Department of Social Services, 436 US 568, 98 S.Ct. 2018 (1978), there can be no intellectual sense made out of an interpretation which provides protection to any entities other than States. It is Federalism that makes the difference here. States are sovereign in their own right, and have Eleventh Amendment protection from certain types of Federal Court proceedings. That is a good reason to find that Congress would have explicitly stated its intention to make States liable under a Federal Civil Rights scheme, or in fact any other Federal legislation. But it is inapplicable to Territories, as it is inapplicable to Municipalities. The hard fact is States can essentially do

whatever they choose to do, and pass any law they choose to pass, so long as it is Constitutional, or Congress has not acted pursuant to a Constitutional grant of supremacy, for example, in interstate commerce, and pre-empted the field of legislation. On the other hand, the Territory of Guam cannot even pass a law until Congress provides it with a means to do so, and in any event, Congress may annul that law at its will. 48 USC 1423(i). It is this philosophy of Federalism which underlies the Eleventh Amendment and underlies this Court's Decision in Will. To provide the Territory of Guam with the immunity and sovereignty of a State with respect to Civil Rights, and provide it to no other entity in the United States, reflects an unreasoned approach.

The remaining arguments set forth by Amicus, which are based on Will, concern the Dictionary Act and the inter-related influence of Monnell v. City of New York Department of Social Services, Supra. The effect of Monnell was discussed in Petitioner's Opening Brief, and need not be rehashed. Amicus's reliance on the fact that Territories were added to the 1871 Act without explanation in 1874 has no bearing on this issue. The District of Columbia was added later, and it is a person. Carter v. District of Columbia, 795 F.2d 116 (DC Cir. 1986).

Amicus's argument concerning Monell is substantially related to the degree of sovereignty inherent in the Territory, and the Petitioners will not re-argue that issue.

SECTION II

The Petitioners concede that if the Territory of Guam is not a person for the purpose of Section 1983, Territorial officers in their official capacities would not be included within its meaning.

SECTION III

Contrary to the conclusions drawn by Amicus, Frett v. Government of Virgin Islands, 839 F.2d. 968 (1988) and the Ninth Circuit's Decision in this case constitute a clear conflict in law among the Circuits. It is apparent that Will does not provide the strong foundation for equating "States" with "Territories" for the purpose of Section 1983. The reason is apparent. Underlying the Decision in Will is a respect for State sovereignty which is neither Constitutionally required nor

traditionally provided for Territories. Will does not solve the problem, nor will its reasoning be employed to hold that Territories are not persons. Moreover, the contention made by Amicus that the Ninth Circuit will overrule its holding in Fleming v. Department of Public Safety, Supra, is imprudent speculation. Justice Brennan points out that it is the Eleventh Amendment which determines the result in Will, and as demonstrated by this Reply, that reasoning is inapplicable to Territories, Commonwealths or the District of Columbia.

Finally, Amicus argues that the question presented here will not arise with such frequency nor is it of "such clear public importance" that review is warranted. As Petitioners attempted to explain in their Opening Brief, it is

the very reason that Guam is small and isolated that effective remedies are necessary. Guam is a developing area, and the institutions and remedies which preserve and protect liberty are fragile. Moreover, the public spirit and tradition of democracy and redress are undeveloped and it is essential that people become aware that they are not helpless in the face of abuse of Constitutional rights in order for a healthy democracy to be instilled here. It is the "simple matter of geography," (Amicus, p.17), that makes it so important that the Supreme Court review this Decision. Guam is far from the mainland, and that is all the more reason that Federal protections must apply.

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AMICUS CURIAE

BRIEF

(A)

No. 88-1281

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In the Supreme Court of the United States

OCTOBER TERM, 1989

ALEX NGIRAINGAS, ET AL., PETITIONERS

v.

FRANCISCO Q. SANCHEZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the government of Guam or its officers, acting in their official capacities, are subject to suit under 42 U.S.C. 1983.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States in this case.

STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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2. Section 2 of the Organic Act of Guam, ch. 512, 64 Stat. 384 (codified at 48 U.S.C. 1421) provides as follows:

> The territory ceded to the United States in accordance with the provisions of the Treaty of Peace between the United States and Spain, signed at Paris, December 10, 1898, and proclaimed April 11, 1899, and known as the island of Guam in the Marianas Islands, shall continue to be known as Guam.

3. Section 3 of the Organic Act of Guam, ch. 512, 64 Stat. 384 (codified at 48 U.S.C. 1421a) provides in part as follows:

> Guam is declared to be an unincorporated territory of the United States * * *. The government of Guam shall have the powers set forth in this chapter, shall have the power to sue by such name, and, with the consent of the legislature evidenced by enacted law, may be sued upon any contract entered into with respect to, or any tort committed incident to, the exercise by the government of Guam of any of its lawful powers.

STATEMENT

1. Petitioners, various residents of the Territory of Guam, brought this action under 42 U.S.C. 1983 against the government of Guam, the Guam Police Department, the director of the Guam Police Department in her official capacity, and various Guam police officers in their official and individual capacities. Pet. App. A2. The complaint alleged that the respondent police officers arrested petitioners and took them to Guam police headquarters, where petitioners were assaulted and forced against their will to sign "Rights Waiver" forms and to give incriminating statements. The complaint also alleged that these actions were "taken pursuant to a *de facto* policy of the government of Guam," Third Amended Complaint para. 53, at 13 (filed June 4, 1986), physically to harass and intimidate persons accused of crime, a policy that was allegedly "known to and encouraged by" the government. *Id.* para. 54, at 14. Petitioners claimed that these actions violated, inter alia, various rights protected by the Fifth and Fourteenth Amendments to the Constitution and various federal laws. They sought compensatory and punitive damages totaling $100 million. *Id.* at 17; Pet. App. A2.

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2. The district court of Guam granted respondents' motion to dismiss. Pet. App. A1-A13. The court held that, by virtue of the Organic Act of Guam, 48 U.S.C. 1421 *et seq.*, the government of Guam possesses sovereign immunity from suit, and that neither Congress nor the Guam legislature has waived that immunity with respect to suits brought under Section 1983. Pet. App. A4-A5. The court held that sovereign immunity also barred petitioners' action against the individual defendants in their official capacities, because any judgment against them "would expend itself on the public treasury." *Id.* at A5.[1]

3. Petitioners appealed, and the court of appeals affirmed in part and reversed in part. Pet. App. A35-A51.[2]

a. The court held that the government of Guam could not be sued under Section 1983 because Guam is an instrumentality of the federal government similar to an adminis-

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[1] The court dismissed the Section 1983 claims against the respondent police officers in their individual capacities on the ground that the suits were barred by the statute of limitations. Pet. App. A6-A9. The court also dismissed without prejudice petitioners' pendent claims based on Guam tort law. *Id.* at A9-A11.

[2] The court of appeals' initial opinion is reprinted at Pet. App. A17-A34. The court of appeals' revised opinion is reprinted in the petition appendix, but the pages are not numbered. We will refer to the court's revised opinion as if it were sequentially numbered from A35-A51.

trative agency, and therefore is not a "person" within the meaning of 42 U.S.C. 1983. Pet. App. A40-A42. For the same reason, the court held that the Guam Police Department is not a "person" under Section 1983. Pet. App. A42. Finally, the court held that Guam police officials may not be sued in their official capacities under Section 1983. The court reasoned that a judgment against those respondents in their official capacities would expend itself against the public treasury and therefore was, in effect, a suit against the government of Guam itself. Pet. App. A43-A44. Because the court of appeals held that Guam is not a "person" for purposes of Section 1983, it did not decide whether Guam enjoyed sovereign immunity from suit under that statute. Pet. App. A25 n.2.

b. The court held that respondent police officers could be sued under Section 1983 in their individual capacities to the extent they were not entitled to immunity. Pet. App. A44-A48. In the court's view, respondent officers were not entitled to immunity from suit in their individual capacities by virtue of the Organic Act of Guam, 48 U.S.C. 1421a, because that provision applied only to suits against the government of Guam (and perhaps to government officials acting in their official capacities). Pet. App. A45-A46. At the same time, the court held that the respondent officers were entitled to invoke qualified immunity under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), for their actions. Pet. App. A46-A48. Because the district court had not addressed the merits of respondents' qualified immunity claims, the court of appeals ordered the district court on remand to determine whether the defendants were entitled to immunity on that ground. *Id.* at A48.[3]

[3] The court also held that petitioners' claims against the respondent police officers in their individual capacities were not barred on statute of limitations grounds. Pet. App. A48-A50. Because the court of appeals reinstated petitioners' Section 1983 claims against those respondents, the court also reversed the district court's dismissal of the pendent Guam law tort claims as to those respondents. *Id.* at A50. The court of appeals left to the district court on remand the question whether to exercise pendent jurisdiction over the Guam law tort claims as to the remaining defendants. *Ibid.*

DISCUSSION

The question in this case is whether, as a "Territory" within the meaning of Section 1983, Guam is a "person" subject to suit under that provision. The court below held that it was not, reasoning that it was excluded from suit because of its status as an "instrumentality" of the federal government. Pet. App. A42. Although we have difficulty with that rationale, we believe the court's conclusion—that Guam is not a "person" subject to suit under Section 1983—is correct, and that this view is strengthened by this Court's decision last Term in *Will* v. *Michigan Dep't of State Police*, 109 S. Ct. 2304 (1989). As a result of that decision, there is not presently any conflict among the circuits warranting this Court's review. We therefore submit that the petition for a writ of certiorari should be denied.

1. Section 1983 provides a remedy for an individual whose rights under federal law have been violated by any "person" who acts "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." Petitioners contend that the government of Guam and the Guam Police Department are each a "person" within the meaning of Section 1983, and that Guam itself is a "Territory" under that statute. Petitioners therefore argue that the courts below erred in dismissing their Section 1983 claims against the government of Guam, the Guam Police Department, and its officers.

We readily agree that Guam is a "Territory" for purposes of Section 1983.[4] But that conclusion does not re-

[4] The text of 42 U.S.C. 1983 does not define the meaning of the term "Territory," and the legislative history of that law is not illumi-

solve this case, because the government of Guam cannot be sued under Section 1983 unless it is a "person" within the

nating. Section 1983 stems from Section 1 of the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13, which applied only to action taken under the color of law of any "State." The accompanying phrase "or Territory" was added to the 1871 Act without explanation in the 1874 codification and revision of the Statutes at Large, Rev. Stat. § 1979. *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 582 (1976); *District of Columbia* v. *Carter*, 409 U.S. 418, 424 n.11 (1973). Moreover, Congress could not have had Guam in mind when the Statutes at Large were adopted in 1874, since Guam did not become an American possession until it was ceded by Spain to the United States in 1898 in the Treaty of Paris. See the Organic Act of Guam, ch. 512, § 2, 64 Stat. 384 (codified at 48 U.S.C. 1421).

Nonetheless, we believe 42 U.S.C. 1983 is clearly applicable in Guam. Because a "Territory" is not a "State" within the meaning of the Fourteenth Amendment, the phrase "or Territory" was "presumably" added to Section 1983 as "an exercise of Congress' power to regulate the territories under Art. IV, § 3, Cl. 2," *Carter*, 409 U.S. at 425 n.11, in order "to insure that all persons residing in the Territories not be denied, by persons acting under color of territorial law, rights guaranteed them by the Constitution and laws of the United States." *Examining Board*, 426 U.S. at 582-583 (footnote omitted). Guam qualifies as a "Territory" within the meaning of that law. Although Guam became a United States possession in 1898, 48 U.S.C. 1421, Congress enacted no legislation concerning the island until it passed the Organic Act of Guam in 1950 (codified as amended at 48 U.S.C. 1421-1424 (1982 & Supp. IV 1986)). See generally Liebowitz, *The Applicability of Federal Law to Guam*, 16 Va. J. Int'l L. 21, 21 (1975). The Guam Organic Act declares Guam to be an "unincorporated territory," and establishes its government with executive, legislative, and judicial branches. 48 U.S.C. 1421a.

The Ninth Circuit has applied Section 1983 to Guam in the past. *Bunyan* v. *Camacho*, 770 F.2d 773 (1985) (applying Section 1983 without addressing the question whether Guam is a "Territory"), cert. denied, 477 U.S. 903 (1986). See *Fleming* v. *Department of Public Safety*, 837 F.2d 401, 404-405 & n.2 (construing *Bunyan* as having held that Section 1983 applies to Guam), cert. denied, 109 S. Ct. 222 (1988). See also House Comm. on Interior and Insular Affairs, *Report of the Commission on the Application of Federal Laws to Guam*, H.R. Doc. No. 212, 82d Cong., 1st Sess. 15 (1951) (listing 42 U.S.C. 1983, then codified at 8 U.S.C. 43 (1946), among the statutes of the United States that are applicable to Guam).

meaning of that law. The court below held that it was not, on the ground that the plenary control over Guam exercised by the federal government meant that "Guam, like the federal government, should not be held liable on the same terms as other entities." Pet. App. A41. As a "creature of the federal government," in other words, Guam was not one of the "bodies politic" intended to be included in that statute. *Ibid.*

Although we have difficulty with the Ninth Circuit's reasoning,[5] we agree with its conclusion that Guam is not a "person" within the meaning of Section 1983. This conclusion is strongly supported by this Court's recent decision in *Will* v. *Michigan Dep't of State Police*, *supra*, holding that a State is not a "person" within the meaning of that law.[6] *Will* is not squarely controlling here, how-

[5] The Ninth Circuit relied on its earlier decision in *Sakamoto* v. *Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1289 (1985), cert. denied, 475 U.S. 1081 (1986), which characterized Guam as a federal instrumentality for purposes of the federal antitrust laws. Pet. App. A41. The question in this case, however, involves a different law, and whether Guam is a person under that law should be considered in light of the text, purposes, and legislative history of that different statute. Cf. *Carter*, 409 U.S. at 420. Congress's decision in 1874 to add the Territories to the scope of Section 1983 indicates that Congress intended to treat them not as part of the federal government for purposes of this law, but in the same manner as the States. Thus, it seems more appropriate to analogize Territories to the States than to the federal government when determining their suability. Nor do we believe that this question should turn on the degree of independence that may be afforded to a particular Territory by its organic legislation.

[6] The Court in *Will* reasoned as follows:

First, if a State were a "person," the wording of the 1871 Act (which refers to a person acting "under color of" state law) would be "a decidedly awkward way of expressing an intent to subject the States to liability." *Will*, 109 S. Ct. at 2308. Thus, the statute provides no reason to depart from the "often-expressed understanding that '• • • the term "person" does not include the sovereign.' " *Ibid.* (citations omitted). This awkwardness is especially significant because the liability created by the Act was novel. *Ibid.*

Second, the text of Section 1983 falls far short of the clarity

ever, for several reasons. Section 1983 refers separately to States and Territories. Moreover, a Territory is not a State for purposes of the Fourteenth Amendment, which Section 1983 was designed to enforce. *District of Columbia* v. *Carter*, 409 U.S. 418, 423-425 & n.11 (1973). Finally, *Will* not only drew on the Eleventh Amendment as part of its reasoning, but also limited its holding to "States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes," 109 S. Ct. at 2311, and the Eleventh Amendment does not apply to Guam, see 48 U.S.C. 1421b(u) (omitting the Eleventh Amendment from various constitutional amendments made applicable to Guam). That being said, the *Will* decision nonetheless supports the conclusion below in several respects.

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necessary to satisfy the clear statement rule articulated in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985) (a case involving the Eleventh Amendment), and similar cases affecting state interests and the federal-state balance. *Will*, 109 S. Ct. at 2308-2309.

Third, since one purpose of Section 1983 was to make a federal forum available for plaintiffs, and since Section 1983 did not abrogate the States' Eleventh Amendment immunity, *Quern* v. *Jordan*, 440 U.S. 332 (1979), it appears that Congress did not intend to provide a remedy against the States that was not available in federal court. *Will*, 109 S. Ct. at 2309.

Fourth, Section 1983 does not override well-established common law immunities or defenses, and sovereign immunity was a familiar principle at common law. *Will*, 109 S. Ct. at 2309.

Fifth, nothing in the legislative history of Section 1983 suggests that Congress intended to bring the States within the scope of that Section's coverage. *Will*, 109 S. Ct. at 2309-2310.

Sixth, the Dictionary Act, Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431, which provided in 1871 that "in all acts hereafter passed * * * the word 'person' [extends to] bodies politic and corporate," referred to such public corporations as municipalities, not to the States. *Will*, 109 S. Ct. at 2310-2311.

Finally, the holding of *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658 (1978), that municipalities are "persons" under Section 1983, is not controlling, because municipalities are not considered part of the State for Eleventh Amendment purposes. *Will*, 109 S. Ct. at 2311.

a. The text of Section 1983 uses the phrase "State or Territory" and implies that each entity has the same legal status as the other for purposes of that law. Because *Will* held that a "State" is not a "person" under Section 1983, it follows, as a straightforward matter of statutory construction, that a "Territory" is likewise not a "person" under that law. The contrary reading of Section 1983 would lead to the same interpretive oddity that *Will* discerned in construing the term "person" to include a "State." It is just as awkward to describe a "Territory" as acting "under color of" its own law as it is to describe a State in those terms. Compare *Will*, 109 S. Ct. at 2308. Thus, it is equally unlikely that Congress intended by this wording to impose liability on the territorial governments. And that is particularly true because, as explained below, holding Territories financially liable for the acts of their officers was no less novel in the 1870s than rendering States liable for such conduct. Compare *Will*, 109 S. Ct. at 2308.

b. *Will* acknowledged this Court's consistent holdings that, in enacting Section 1983, "Congress did not intend to override well-established immunities or defenses under the common law." 109 S. Ct. at 2309 (collecting cases). That principle is directly applicable here, because this Court has held that Territories are entitled to invoke sovereign immunity for much the same reasons that the federal government and the States may do so. *Kawananakoa* v. *Polyblank*, 205 U.S. 349, 353 (1907);[7] *Porto Rico* v. *Rosaly*, 227

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[7] This Court's reasoning in *Kawananakoa* parallels the reasons given by the territorial courts why Territories may invoke sovereign immunity, see *Wisconsin* v. *Doty*, 1 Pin. 396, 407 (Wis. 1844); *Langford* v. *King*, 1 Mont. 33, 38 (1868), as well as the reasons given by this Court why the States cannot be sued without their consent, see *Beers* v. *Arkansas*, 61 U.S. (20 How.) 527, 529 (1857). As Justice Holmes wrote for the Court in *Kawananakoa* v. *Polyblank*, 205 U.S. at 353-354 (citations omitted):

> Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but

U.S. 270, 273 (1913); *Porto Rico* v. *Emmanuel,* 235 U.S. 251, 257 (1914). Moreover, in 1874, when Section 1983 was amended to include Territories, the territorial courts had held that Territories, like States, are immune from suit absent their consent. *Wisconsin* v. *Doty,* 1 Pin. 396, 407 (Wis. 1844);[8] *Langford* v. *King,* 1 Mont. 33, 38 (1868).[9] See

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the answer has been public property since before the days of Hobbes. A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. * * *

As the ground is thus logical and practical, the doctrine is not confined to powers that are sovereign in the full sense of juridicial theory, but naturally is extended to those that in actual administration originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights. A suit presupposes that the defendants are subject to the law invoked. Of course it cannot be maintained unless they are so. But that is not the case with a territory of the United States, because the Territory itself is the fountain from which rights ordinarily flow. It is true that Congress might intervene, just as in the case of a State the Constitution does, and the power that can alter the Constitution might. But the rights that exist are not created by Congress or the Constitution, except to the extent of certain limitations of power. The District of Columbia is different, because there the body of private rights is created and controlled by Congress and not by a legislature of the District. But for the Territory of Hawaii it is enough to refer to the organic act.

[8] "For all necessary purposes of government, Wisconsin is as a sovereignty, and should be entitled to the same immunities. It is a territory of the United States, and is considered thereby a part of the United States or immediately connected therewith. For these reasons we come to the conclusion that, the Territory of Wisconsin cannot be sued in the courts of the Territory in the absence of express authority of law for that purpose." *Wisconsin* v. *Doty,* 1 Pinn. at 407.

[9] "Montana Territory is a government created, it is true, by a law of Congress. Yet that law gives it very extensive powers. The reason of the law, which declares that no government can be sued without its consent, applies to this territorial government as well as to any other government." *Langford* v. *King,* 1 Mont. at 38.

Beachy v. *Lamkin,* 1 Idaho 50, 52 (1866).[10] See also *Fisk* v. *Cuthbert,* 2 Mont. 593, 598 (1877). Indeed, in *Porto Rico* v. *Rosaly,* 227 U.S. at 274, the Court noted that "the incorporated Territories have always been held to possess an immunity from suit." [11] Thus, the state sovereign immunity principles that formed the background to the adoption of the original version of Section 1983 in 1871 have strong parallels in the case of a Territory.

c. The legislative history of Section 1983 does not indicate that Congress sought to render territorial governments liable for the unlawful actions of their officers. Section 1983 was originally enacted as Section 1 of the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13, which applied only to action taken under color of the law of any "State."

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[10] "In no event could this court render a judgment against the territory for costs. We have no means of enforcing it, there being no process by which it could be made effective." *Beachy* v. *Lamkin,* 1 Idaho at 52.

[11] In using the term "incorporated Territories," *Rosaly* referred to the two-part classification scheme developed by this Court in a series of cases decided at the turn of the century that has come to be known as the *Insular Cases, e.g., De Lima* v. *Bidwell,* 182 U.S. 1 (1901); *Dooley* v. *United States,* 182 U.S. 222 (1901); *Armstrong* v. *United States,* 182 U.S. 243 (1901); *Downes* v. *Bidwell,* 182 U.S. 244 (1901). "Incorporated Territories" are Territories destined for statehood from the time of their acquisition (such as Wisconsin and Montana), while "unincorporated Territories" are Territories that are not acquired in anticipation of statehood. *Examining Board,* 426 U.S. at 599 n.30. Gu[illegible]as into the latter category, because Guam is expressly defined by s[illegible]on 3 of the Organic Act of Guam, ch. 512, 64 Stat. 384 (codified at 48 U.S.C. 1421a) as an "unincorporated territory." That distinction, however, is immaterial in this case. The difference between incorporated and unincorporated territories did not exist in 1874, and Congress could not have had in mind a distinction this Court did not announce until a quarter century later. The relevant question is the state of the law in 1874, and the law then was that all Territories could invoke sovereign immunity.

The 1871 Act therefore did not apply to Territories at all. The phrase "or Territory" was added to the 1871 Act without explanation in the 1874 codification and revision of the Statutes at Large. Rev. Stat. § 1979 (1874). See *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 582 (1976); *Carter*, 409 U.S. at 424-425 n.11; pages 5-6 note 4, *supra*. Given the background of territorial sovereign immunity against which the 1874 amendment was adopted, that silence is as significant in this context as it was in *Will*, 109 S. Ct. at 2310 (noting that the legislative history of Section 1983 does not indicate an intent to abrogate the States' Eleventh Amendment immunity). Moreover, it would have been anomalous for a Reconstruction Congress to have intended to render federal Territories liable when the States (including, of course, the Southern States) were not. Accordingly, nothing in the 1874 amendment to the 1871 Act suggests an intent to make Territories liable under that law, or to treat Territories differently from States for liability purposes.

d. *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658 (1978), held that a municipality is a "person" under Section 1983. In so ruling, the Court relied, 436 U.S. at 688-689 & nn. 51 & 53, on the Dictionary Act, Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431, which stated that "in all acts hereafter passed * * * the word 'person' [extends to] bodies politic and corporate." *Will* ruled that the Dictionary Act definition of "person" did not include the States, because in the nineteenth century the term "public corporation" was understood to refer to municipal corporations and their equivalent local government units (towns, cities, and counties), rather than to the States, which were sovereign entities. 109 S. Ct. at 2310-2311. That interpretation of the Dictionary Act is also applicable here, since in the nineteenth century a Territory was also deemed to be a sovereign entity, even though it was subject

to direct congressional regulation under the Territories Clause of the Constitution, Art. IV, § 3, Cl. 2. *Wisconsin* v. *Doty*, 1 Pin. at 407; *Langford* v. *King*, 1 Mont. at 38. See *Kawananakoa* v. *Polyblank*, 205 U.S. at 353-354. Thus, for this purpose, too, a Territory is more analogous to a State than to a municipality. What is more, as Justice Brennan noted in his dissent in *Will*, 109 S. Ct. at 2317, in 1874, as part of the same revision and codification of federal law that included Territories within the scope of Section 1983, Congress repealed the Dictionary Act's definition of "person" as including bodies politic and corporate. Accordingly, the Dictionary Act supplies no ground for treating Section 1983 as an abrogation of the Territories' inherent sovereign immunity.

e. Congress has legislated for the Territory of Guam with the foregoing sovereign immunity principles in mind. The Organic Act of Guam, enacted by Congress in 1950, did not expressly authorize suit against the government of Guam, nor did it empower Guam to waive its sovereign immunity.[12] The failure to include such a provision in the Organic Act, Congress believed, made it "doubtful * * * whether the Legislature of Guam could authorize such suits to be brought." H.R. Rep. No. 214, 86th Cong., 1st Sess. 1 (1959); S. Rep. No. 969, 86th Cong., 1st Sess. 1 (1959). To remedy this situation, Congress in 1959 passed 48 U.S.C. 1421a to "permit the government of Guam, with the consent of its legislature, to be sued" in tort or contract with respect to the exercise by Guam of any of its lawful

[12] Section 3 of the Organic Act of Guam originally provided that "[t]he government of Guam shall have the powers set forth in this chapter and shall have power to sue by such name." 64 Stat. 384, 48 U.S.C. 1421a (1958). The Organic Act did not also provide that the government of Guam could itself be sued.

powers. H.R. Rep. No. 214, *supra,* at 1; S. Rep. No. 969, *supra,* at 1-2. As explained in a letter from the Assistant Secretary of the Interior incorporated in the House and Senate Reports accompanying the amendment, the amendment "enables the Legislature of Guam to waive *the sovereign immunity which was conferred upon the government of Guam by the Congress through enactment of the Guam Organic Act* when, in the legislature's opinion, the best interests of both the people and government of Guam would be served by allowing such an action to be brought." H.R. Rep. No. 214, *supra,* at 2 (emphasis added); S. Rep. No. 969, *supra,* at 2 (same). Thus, the 1959 measure confirms Congress's understanding that Territories like Guam, and the government of Guam in particular, may rely on the doctrine of sovereign immunity to protect themselves from suit without their consent.[13]

For all these reasons, we believe the judgment below was correct: a Territory, like a State, is not a "person" under Section 1983.[14]

[13] Neither the text of that law nor its legislative history specifically addresses the question whether Guam should be immune from *constitutional* torts. Moreover, this Court's decisions in *Porto Rico* v. *Rosaly,* 227 U.S. at 273, and *Kawananakoa* v. *Polyblank,* 205 U.S. at 353, did not involve federal constitutional claims. Nonetheless, it seems reasonable to conclude that, just as the federal government and the States enjoy sovereign immunity from nonconsensual damage actions based on federal constitutional claims, so, too, Territories should be immune from such nonconsensual suits.

[14] Even if Guam were a "person" for purposes of Section 1983, the question would still remain, as Justice Brennan noted with respect to the State in his dissent in *Will,* 109 S. Ct. at 2320, whether and to what extent the defense of sovereign immunity could be invoked. That question—which would raise various issues regarding the scope of Guam's sovereign immunity, the effect of Section 1983 on that immunity, and the interrelationship between Section 1983 and 48 U.S.C. 1421a—was not discussed by the court below.

2. If Guam, like a State, is not a "person" for purposes of Section 1983, *Will* also resolves the question whether officers of Guam can be sued for damages in their official capacity. What the Court held in *Will,* 109 S. Ct. at 2311 (citation omitted), is fully applicable to territorial officers: "Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." Petitioners therefore cannot "circumvent congressional intent by a mere pleading device," *ibid.* (footnote omitted), of suing the officers of Guam in their official capacity.

3. There is currently no conflict among the circuits warranting this Court's review. To be sure, the Third Circuit in *Frett* v. *Government of Virgin Islands,* 839 F.2d 968, 977 (1988), concluded that the Territory of the Virgin Islands was a "person" within the meaning of Section 1983. But that case was decided before this Court's decision in *Will,* and the Third Circuit assumed in reaching its conclusion that, after *Monell,* a State *was* a "person" under Section 1983. 839 F.2d at 977. Since *Will* has rendered this assumption incorrect, it is by no means clear that the Third Circuit would reach the same result today. Thus, even assuming that Guam and the Virgin Islands are indistinguishable for this purpose, no present conflict appears to exist.

For the same reason, there is no present conflict between the decision below and the Ninth Circuit's earlier decision in *Fleming* v. *Department of Public Safety,* 837 F.2d 401, cert. denied, 109 S. Ct. 222 (1988).[15] In that case, the Ninth Circuit, relying on this Court's decisions in *Monell* and *Quern* v. *Jordan,* 440 U.S. 332 (1979) (Section

[15] In any event, an intracircuit conflict provides no basis for this Court's review. *Wisniewski* v. *United States,* 353 U.S. 901, 902 (1957).

1983 does not abrogate the States' Eleventh Amendment immunity), held that the Commonwealth of the Northern Marianas is a "person" under Section 1983, for two reasons. First, the court concluded that "governmental entities are persons for purposes of Section 1983, but * * * those entities protected by the eleventh amendment remain immune from suits brought in federal court without their consent." 837 F.2d at 406; see also *id.* at 406-407. Second, the court held that, even if a State were not a "person" under Section 1983, the Commonwealth of the Marianas is a "person," "because the argument that a state is not a person is premised *exclusively* upon the fact that states enjoy eleventh amendment immunity." 837 F.2d at 407 n.7 (emphasis added), citing *Quern,* 440 U.S. at 343. This Court's subsequent decision in *Will,* however, shows that both of those conclusions are in error. While the Court in *Will* drew on the Eleventh Amendment in concluding that a State is not a person for purposes of Section 1983, the Court did not in so ruling rely "exclusively" on the Eleventh Amendment. See pages 7-8 note 6, *supra.* Thus, the Ninth Circuit may well reconsider its reasoning in *Fleming* in light of this Court's decision in *Will.*[16]

4. Finally, the question presented is not one that has arisen with such frequency, nor is it otherwise of such clear public importance, that review by this Court is warranted in the absence of a conflict among the circuits. In the past, the question whether a territorial government or its officers can be sued under Section 1983 has arisen in only a small number of cases. Moreover, it is an issue that, as a simple matter of geography, is likely to arise in the future only in a small number of circuits, such as the First, Third, or Ninth. In light of this Court's recent decision in *Will,* we see no need for the Court to consider the narrow question presented by this case unless and until the courts of appeals are unable to agree on *Will*'s effect on that question.

[16] The decision below does not conflict with *Carter* v. *District of Columbia,* 795 F.2d 116 (D.C. Cir. 1986). See Pet. 33. In *Kawananakoa* v. *Polyblank,* 205 U.S. at 352-354, this Court distinguished the District of Columbia from the Territories for sovereign immunity purposes. In any event, *Carter* did not address the question whether the District of Columbia is a person under Section 1983. See 795 F.2d at 122-126 (upholding a directed verdict for the city on the ground that the plaintiff did not establish an official custom or policy under *Monell*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JOINT

APPENDIX

No. 88-1281

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

ALEX NGIRAINGAS, OSCAR ONGKLUNGEL, JIMMY MOSES, ARTHUR MECHOL, JONAS NGEHEED and BOLANDIS NGIRAINGAS,

Petitioners,

vs.

FRANCISCO Q. SANCHEZ, individually and as a Police Officer, JOSEPH R. CRUZ, individually and as a Police Officer, JOSE T. TERLAJE, individually and as a Police Officer, JOE P. BALAJADIA, individually and as a Police Officer, ELMER F. SARDOMA, individually and as a Police Officer, JOSEPH A. SAN NICOLAS, individually and as a Police Officer, JUDITH P. GUTHERTZ, in her Official Capacity as Director of the Department of Public Safety (Guam Police Department), THE GUAM POLICE DEPARTMENT and THE GOVERNMENT OF GUAM,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

Civil Action #85-0064

IN THE DISTRICT COURT OF GUAM

1985

September 24, 1985	Civil Rights Complaint for Damages, Jury Trial Demanded
October 3, 1985	First Amended Complaint for Damages for Civil Rights, Jury Trial Demanded

1986

June 4, 1986	Third Amended Complaint for Damages, Civil Rights, Jury Trial Demanded
June 16, 1986	Answer to Third Amended Complaint
August 18, 1986	Motion and Notice of Motion for Dismissal and for Summary Judgment
October 30, 1986	Memorandum Order
October 30, 1986	Judgment
November 3, 1986	Notice of Appeal

RELEVANT DOCKET ENTRIES

Case #86-2840

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

1986

December 8, 1986	Appeal docketed.
	1988
June 7, 1988	Opinion filed and Judgment entered affirming in part and reversing in part the Judgment entered in the District Court.
June 22, 1988	Petition for Re-hearing and Suggestion for Re-hearing en banc filed.
September 28, 1988	Order and Amended Opinion filed.

IN THE DISTRICT COURT OF GUAM

TERRITORY OF GUAM

ALEX NGIRAINGAS, OSCAR ONGKLUNGEL, JIMMY MOSES, ARTHUR MECHOL, JONAS NGEHEED, AND BOLANDIS NGIRAINGAS, Plaintiffs, vs. FRANCISCO Q. SANCHEZ, individually and as a Police Officer, JOSEPH R. CRUZ, individually and as a Police Officer, JOSE T. TERLAJE, individually and as a Police Officer, JOE P. BALAJADIA, individually and as a Police Officer, ELMER F. SARDOMA, individually and as a Police Officer, JOSEPH A. SAN NICOLAS, individually and as a Police Officer, JUDITY P. GUTHERTZ, in her Official Capacity as Director of the Department of Public Safety (Guam Police Department), THE GUAM POLICE DEPARTMENT, and THE GOVERNMENT OF GUAM Defendants.	D.C. CASE # 85-0064 THIRD AMENDED COMPLAINT FOR DAMAGES CIVIL RIGHTS JURY TRIAL DEMANDED (Filed Jun 4 - 1986)

Plaintiffs, through undersigned counsel, allege:

JURISDICTION

1. Jurisdiction is conferred on this Court by the provisions of 28 USC 1331, 28 USC 1343 and 42 USC 1424. In doing the acts herein alleged, Defendants, and each of them, deprived Plaintiffs of their rights secured by the Constitution of the United States, particularly the rights to Due Process of Law and Equal Protection of law arising under the Fifth and Fourteenth Amendments, and those rights secured by 48 USC 1421b(e) (u); all in violation of 42 USC 1981, 1983, 1985 and 1986. Plaintiffs further invoke the pendent and ancilliary jurisdiction of this Court to determine questions arising under the laws of the Territory of Guam.

PARTIES

2. The Plaintiff Alex Ngiraingas, at all times herein relevant, was a citizen of the United States and a resident of the Territory of Guam.

3. The Plaintiff Oscar Ongklungel, at all times herein relevant, was a citizen of the Republic of Palau, and a resident of the Territory of Guam.

4. The Plaintiff Arthur Mechol, at all times herein relevant, was a citizen of the Republic of Palau and a resident of the Territory of Guam.

5. The Plaintiff Jimmy Moses, at all times herein relevant, was a citizen of the Republic of Palau and a resident of the Territory of Guam.

6. The Plaintiff Jonas Ngeheed, at all times herein relevant, was a citizen of the Republic of Palau and a resident of the Territory of Guam.

7. The Plaintiff Bolandis Ngiraingas, at all times herein relevant, was a citizen of the United States and a resident of the Territory of Guam.

8. The Defendant Francisco Q. Sanchez, at all times herein relevant, was a citizen of the United States, a resident of the Territory of Guam, and a duly appointed police officer of the Guam Police Department (GPD) formerly the Department of Public Safety (DPS) Government of Guam, acting within the course and scope of his official capacity and duties and under color of law and authority.

9. The Defendant Joseph A. San Nicolas, at all times herein relevant, was a citizen of the United States, a resident of the Territory of Guam, and duly appointed police officer of the Guam Police Department, Government of Guam, formerly Department of Public Safety (DPS) Government of Guam acting within the course and scope of his official capacity and duties and under color of law and authority.

10. The Defendant Joseph R. Cruz, at all times herein relevant, was a citizen of the United States, a resident of the Territory of Guam, and a duly appointed police officer of the Guam Police Department, Government of Guam, formerly Department of Public Safety (DPS) Government of Guam acting within the course and scope of his official capacity and duties and under color of law and authority.

11. The Defendant Jose T. Terlaje, at all times herein relevant, was a citizen of the United States, a resident of

the Territory of Guam, and a duly appointed police officer of the Guam Police Department (GPD), Government of Guam, formerly Department of Public Safety (DPS), Government of Guam, acting within the course and scope of his official capacity and under color of law and authority.

12. The Defendant Jose D. Balajadia, at all times herein relevant, was a citizen of the United States, a resident of the Territory of Guam, and a duly appointed police officer of the Guam Police Department (GPD), Government of Guam, formerly Department of Public Safety (DPS), Government of Guam, acting within the course and scope of his official capacity and under color of law and authority.

13. The Defendant Elmer F. Sardoma, at all times herein relevant, was a citizen of the United States, a resident of the Territory of Guam, and a duly appointed police officer of the Guam Police Department (GPD), Government of Guam, formerly Department of Public Safety (DPS), Government of Guam, acting within the course and scope of his official capacity and under color of law and authority.

14. The Defendant Judith P. Guthertz, at all times herein relevant, was a citizen of the United States, a resident of the Territory of Guam, and a duly appointed Director of the Department of Public Safety, (now Guam Police Department) Government of Guam, and was acting in her Official capacity as said Director of the Department of Public Safety (DPS) under color of law and authority.

15. The Defendant, Government of Guam, is the duly constituted government of the Territory of Guam,

and through its Department of Public Safety (now Guam Police Department) is the employer of Defendants Judith P. Guthertz, in her official capacity as Director of the Department of Public Safety (GPD), Francisco Q. Sanchez, Joseph A. San Nicolas, Joseph R. Cruz, Jose T. Terlaje, Jose P. Balajadia and Elmer F. Sardoma as police officers.

16. At all times herein relevant, Defendants, and each of them, acted on agreement with one another to do the acts herein alleged in depriving Plaintiffs of their Civil Rights, in violation of 42 USC 1985, and failed to prevent such acts in violation of 42 USC 1986.

PRELIMINARY FACTS

17. On or about March 31, 1983 at approximately 6:35 a.m., Plaintiffs were arrested by Defendant officers, and each of them, acting within the course and scope of their official capacity.

18. After said arrest, Plaintiffs were transported, while in police custody, to the DPS (GPD) Narcotics Office, 7th Floor, Pedro's Plaza, Agana, Guam.

FIRST CAUSE OF ACTION
(Deprivation of Civil Rights)

19. Plaintiff Alex Ngiraingas, realleges, as though fully set forth herein, the allegations contained in paragraphs 1 through 18, inclusive.

20. While at the aforesaid DPS (GPD) Narcotics Office, Plaintiff was asked by Defendant Police Officer Francisco Q. Sanchez, to sign a "Rights Waiver" form. When Plaintiff Ngiraingas refused to do so, he was asked to write a statement implicating himself in the crime

which was the subject of his arrest. Plaintiff Ngiraingas refused to comply, invoking the privilege against self incrimination, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and 48 USC 1421 (b) (d). As a result of this assertion of constitutional right, Defendant Sanchez harassed, assaulted and intimidated Plaintiff.

21. As a result, Plaintiff Ngiraingas was coerced into writing a statement of self-implication. This was not accepted by Defendant Sanchez. Plaintiff was then taken to the Narcotics Office rest room by Defendant Sanchez where he was further harassed, threatened, intimidated and beaten, and thereby coerced into writing a statement which Defendant Police Officer Sanchez demanded.

22. Plaintiff Ngiraingas did not use any force or resistance when he was arrested, interrogated and detained.

23. During the interrogation and questioning of Plaintiff, Defendant Sanchez used illegal and unconstitutional means including harassment, threats, intimidation and physical beating to obtain the signature and statement of Plaintiff Ngiraingas.

24. The acts described in paragraphs 21 through 23 constitute an unlawful interrogation and a deprivation of Plaintiff's Rights, Privileges and Immunities secured by the United States Constitution and the Federal and Territorial laws; an impediment, hindrance and obstruction of the due course of justice in the Territory of Guam with intent to deny Plaintiff's the Equal Protection of the Laws, and a denial of Plaintiff's Right to Due Process of the Law and Privileges against Self-Incrimination,

secured by the Fifth and Fourteenth Amendments to the Constitution and 48 USC Section 1421(b) (e) (u), in violation of 42 USC Sections 1981, 1983, 1985 and 1986; and 48 USC Section 1421(b) (d) (e) (u).

WHEREFORE, Plaintiff prays as set forth herein below.

SECOND CAUSE OF ACTION
(Deprivation of Civil Rights)

25. Plaintiff Oscar Ongklungel repeats the allegations set forth in paragraphs 1 through 18, inclusive of this Complaint and incorporates said allegations herein, as if set forth in full.

26. Plaintiff Ongklungel, while at the DPS (GPD) Narcotics Office, 7th Floor, Pedro's Plaza, Agana, Guam, was interrogated and given the "Rights Waiver" form to sign. When he refused to waive his Rights, he was taken to the office of Defendant Jose T. Terlaje by Defendant Joseph R. Cruz where Cruz slapped and abused Plaintiff in the presence of Defendant Terlaje. When Plaintiff Ongklungel told Cruz that he will write a statement of self-incrimination, Cruz stopped beating Plaintiff. The statement which Plaintiff prepared and gave to Defendant Cruz was rejected as inadequate by Defendant Cruz. Defendant Cruz then took Plaintiff to the restroom of the Narcotics Office and maliciously assaulted him. Defendant F.Q. Sanchez joined the assault on the Plaintiff. Defendant J.A. San Nicolas was present while the assault was being perpetrated and did nothing to prevent or stop it. The assault only stopped when Plaintiff was forced to

write a self-incriminating statement that the Defendants Cruz, Sanchez and San Nicolas demanded.

27. Plaintiff did not provoke the Defendant Officers to assault him, nor did he use force or offer resistance.

28. The means used by Defendants Cruz, Terlaje, Sanchez and San Nicolas in interrogating, and obtaining Plaintiff's signature and statements were unlawful and unconstitutional.

29. The acts described in paragraphs 26 through 28 constitute an unlawful interrogation and a deprivation of Plaintiff's Rights, Privileges, and Immunities secured by the United States Constitution and the Federal and Territorial laws; an impediment, hindrance and obstruction of the due course of justice in the Territory of Guam with intent to deny Plaintiff the Equal Protection of the Law and denial of Plaintiff's Right to Due Process of Law and Privilege against Self-Incrimination secured by the Fifth and Fourteenth Amendments to the U.S. Constitution and 48 USC Section 1421(b) (d) (e) (u), and in violation of 42 USC Sections 1981, 1983, 1985 and 1986.

WHEREFORE, Plaintiff prays as set forth herein below;

THIRD CAUSE OF ACTION
(Deprivation of Civil Rights)

30. Plaintiff Jimmy Moses, repeats the allegations set forth in paragraphs 1 through 18, inclusive, and incorporates said allegations herein, as if set forth in full.

31. Plaintiff, while at the said offices, was interrogated and was being coerced by Defendant Sanchez to execute the "Rights Waiver" form, which he refused to

do. Defendant Sanchez then took Plaintiff to the Narcotics Office rest room where Sanchez malicously assaulted Plaintiff Moses. After the assault, Plaintiff was taken back into the office and Defendant Sanchez forced and coerced him to sign the "Rights Waiver" form. Plaintiff signed the "Rights Waiver" form and made a statement of self-incrimination after he saw Plaintiff Jonas Ngeheed, who appeared to have been injured by Defendant Police Officers, and each of them.

32. Plaintiff did not do anything to provoke or resist Defendant Police Officers.

33. The means used by Defendants, especially officer Sanchez, in obtaining Plaintiff's signature and statement and the manner and conduct of Plaintiff's interrogation were unlawful, unconstitutional and coercive.

34. The acts described in paragraphs 31 through 33 constitute an unlawful interrogation and a deprivation of Plaintiff's Rights, Privileges and Immunities secured by the United States Constitution and Federal and Territorial laws; an impediment, hindrance and obstruction of the due course of justice in the Territory of Guam with intent to deny Plaintiff the Equal Protection of the Law and a denial of Plaintiff's Right to Due Process of Law and Privilege against Self-incrimination secured by the Fifth and Fourteenth Amendments of the U.S. Constitution and 48 USC Section 1421 (b) (d) (e) (u), in violation of 42 USC Section 1981, 1983, 1985 and 1986.

WHEREFORE, Plaintiff prays as set forth herein below.

FORTH CAUSE OF ACTION

35. Plaintiff Arthur Mechol repeats the allegations set forth in paragraph 1 through 18, inclusive, and incorporates said allegations herein as if set forth in full.

36. When the Defendant Police officers were conducting the arrest aforementioned, Defendant Joseph R. Cruz used excessive force and struck Plaintiff on the neck while Defendant Elmer F. Sardoma looked on.

37. While Plaintiff Mechol was at the DPS (GPD) offices at Pedro's Plaza, Agana, Guam, he was forced to write a statement of self-incrimination by Defendants, and each of them, which he did for fear of being assaulted again.

38. Plaintiff did not provoke or resist the Defendant Officers.

39. The assault by Defendant Joseph R. Cruz at the scene of the arrest, the non-action of Defendant Elmer Sardoma to prevent the assault and the means used by them in the interrogation and obtaining Plaintiff's statement and signature were unlawful, unconstitutional and coercive.

40. The acts described in paragraphs 36 through 39 constitute an unlawful interrogation and a deprivation of Plaintiff's Rights, Privileges and Immunities secured by the United States Constitution and the Federal and Territorial laws; an impediment, hindrance and obstruction of the due course of justice in the Territory of Guam with intent to deny Plaintiff the Equal Protection of the Law and a denial of Plaintiff's Right to Due Process of Law and Privilege against Self-incrimination secured by the

Fifth and Fourteenth Amendments to the U.S. Constitution and 48 USC Section 1421 (b) (d) (e) (u), in violation of 42 USC Section 1981, 1983, 1985 and 1986.

WHEREFORE, Plaintiff prays as set forth herein below.

FIFTH CAUSE OF ACTION
(Deprivation of Civil Rights)

41. Plaintiff Jonas Ngeheed repeats the allegations set forth in paragraphs 1 through 18 inclusive, and incorporates said allegations herein as if set forth in full.

42. Plaintiff, while at said offices, refused to write a self-incriminating statement. As a result, Defendant Francisco Q. Sanchez and Joseph San Nicolas took him to the restroom where Defendant Sanchez assaulted him, as a result of which, he was knocked down to the floor. While still lying on the floor, Defendant San Nicolas kicked and punched him. Defendant San Nicolas then picked up Plaintiff and placed him against the wall and continued to punch him on or about the body. Plaintiff fell for the second time and both Sanchez and San Nicolas continued to kick him on the body.

Another of the Defendants, at this time unidentified, slammed Plaintiff's head against the concrete wall. Defendant Joseph R. Cruz, who walked into the rest room while Plaintiff was being assaulted by the other Defendants did nothing to stop the assault and battery. After the assault and battery, he was taken back to the office and forced to write a self-incriminating statement. He did so for fear of another assault and battery.

43. Plaintiff did not provoke or resist Defendants.

44. The means used by Defendants Sanchez, San Nicolas and Joseph Cruz in obtaining Plaintiff's statement and signature were unlawful, unconstitutional and coercive.

45. The acts described in paragraphs 42 through 44 constitute an unlawful interrogation and a deprivation of Plaintiff's Rights, Privileges and Immunities secured by the United States Constitution and Federal and Territorial laws; an impediment, hindrance and obstruction of the due course of justice in the Territory of Guam with intent to deny Plaintiff the Equal Protection of the Law and a denial of Plaintiff's Right to Due Process of Law and Privilege against Self-incrimination secured by the Fifth and Fourteenth Amendments of the U.S. Constitution and 48 USC Section 1421 (b) (d) (e) (u), in violation of 42 USC Section 1981, 1983, 1985 and 1986.

WHEREFORE, Plaintiff prays as set forth herein below.

SIXTH CAUSE OF ACTION
(Deprivation of Civil Rights)

46. Plaintiff Bolandis Ngiraingas repeats the allegations set forth in paragraphs 1 through 18 inclusive and incorporates said allegations heren as if set forth in full.

47. Plaintiff Bolandis Ngiraingas, while at said offices was told to write a self-incriminatory statement. He asked the Defendant San Nicolas if he could refuse to write such statement. San Nicolas did not answer but punched Plaintiff about the head while he was seated in

the office. Defendants Francisco Sanchez and Jose Balajadia were present when Plaintiff was assaulted by San Nicolas but did nothing to prevent or stop it. The assault stopped when Plaintiff promised to write a statement.

48. Plaintiff did not provoke or resist Defendants.

49. The means used by Defendants San Nicolas, Sanchez and Balajadia in obtaining Plaintiff's statement and signature were unlawful, unconstitutional and coercive.

50. The acts described in paragraphs 47 through 49 constitute an unlawful interrogation and a deprivation of Plaintiff's Rights, Privileges and Immunities secured by the United States Constitution and Federal and Territorial laws; an impediment, hindrance and obstruction of the due course of justice in the Territory of Guam with intent of deny Plaintiff the Equal Protection of the Law and a denial of Plaintiff's Right to Due Process of Law and Privilege against Self-incrimination secured by the Fifth and Fourteenth Amendments of the U.S. Constitution and 48 USC Section 1421 (b) (d) (e) (u), in violation of 42 USC Section 1981, 1983, 1985 and 1986.

WHEREFORE, Plaintiff prays as set forth herein below.

SEVENTH CAUSE OF ACTION

51. Plaintiffs, and each of them, incorporate the allegations of paragraphs 1 through 50, inclusive, as though fully set forth herein.

52. At all times herein relevant hereto and in each and all of their actions described herein, Defendants

Francisco Q. Sanchez, Joseph A. San Nicolas, Joseph R. Cruz, Jose T. Terlaje, Jose P. Balajadia, Elmer F. Sardoma, and Judith P. Guthertz were acting under the color and pretense of statutes, ordinances, regulations, customs and usages of the Territory of Guam and under the scope and authority of their offices and in their official capacities were acting as such police officers, personnel, agents, and employees and Director of the Department of Public Safety (GPD) of the Government of Guam.

53. The actions of Defendants Sanchez, San Nicolas, Cruz, Terlaje, Balajadia, Sardoma, and Guthertz resulted from and were taken pursuant to a *de facto* policy of the Government of Guam, which is implemented by its Department of Public Safety Director (GPD), police officers, agents, personnel and employees to summarily punish persons, including Plaintiffs, who refuse to obey police orders, whether lawful or not, by means of excessive use of force, harassment, intimidation, violence and denial of the basic civil and constitution rights.

54. The existence of the *de facto* policy has been known and encouraged by supervisory and policy making officers and officials of the Department of Public Safety (Guam Police Department) and the Government of Guam for a substantial period of time.

55. Despite their knowledge of the said illegal policy and practices, the supervisory and policy making officers and officials of the said Department of Public Safety (GPD) and the Government of Guam have not taken steps to terminate said practices, have not disciplined or otherwise properly supervised the individual officers, agents, employees and personnel who engaged

in the said practices, have not effectively trained them with regard to proper constitutional and statutory limits on the exercise of their authority, and have instead sanctioned, condoned and ratified the policy and practices described herein, through their deliberate and callous indifference to the Civil and Constitutional Rights of the persons in their custody including Plaintiffs.

56. Defendant Government of Guam, having caused the violation of Plaintiffs Civil and Constitutional Rights, has violated 42 USC Sections 1981, 1983, 1985 and 1986, 48 USC Section 1421 (b) (c) (e) (u) and the Fifth and Fourteenth Amendments of the U.S. Constitution. Plaintiffs have filed a claim with the Government of Guam and the Government of Guam has rejected said claim in its entirety.

57. As a result of the acts of the Defendants, and each of them, as alleged herein, Plaintiffs have suffered physical and mental injuries, severe emotional distress, deprivation of their liberties, and pain and suffering.

WHEREFORE, Plaintiffs pray for Judgment as set forth below.

EIGHTH CAUSE OF ACTION

58. Plaintiffs repeat the allegations in paragraphs 1 through 57, inclusive, and incorporate said allegations herein, as if set forth in full.

59. The acts and conduct of each of the Defendants constitute assault and battery, intentional infliction of emotional distress, malicious interrogation, negligence and gross negligence under the laws of the Territory of

Guam and this Court has pendent and ancillary jurisdiction to hear and adjudicate said claims.

WHEREFORE, Plaintiffs pray as set forth herein below.

NINTH CAUSE OF ACTION
(CONSPIRACY)

60. Plaintiffs repeat the allegations set forth in paragraphs 1 through 59 inclusive and incorporate said allegations herein, as if set forth in full.

61. The acts and conduct of each and all of Defendants constitute a conspiracy for the purpose of impeding, hindering, obstructing, or defeating in any manner, the due course of justice in the Territory of Guam, with intent to deny the Plaintiffs the Equal Protection and Due Process of the Laws and Privilege against Self-incrimination secured by the United States Constitution, in violation of 42 USC 1985 and 1986.

WHEREFORE, Plaintiffs pray as set forth herein below.

CAUSE OF ACTION

62. Plaintiffs repeat the allegations as set forth in paragraphs 1 through 61 inclusive, and incorporate said allegations herein, as if fully set forth.

63. At all times herein relevant, the Defendants, and each of them, had knowledge of the conspiracy and participated in such conspiracy of harassing, intimidating and assaulting Plaintiffs and denying them the Civil and Constitutional Rights. Defendants, and each of them, had

the power and authority to prevent or aid in preventing such unlawful and unconstitutional acts and have neglected, failed and refused to do so in violation of 42 USC 1986.

WHEREFORE, Plaintiffs pray as set forth herein below.

TENTH CAUSE OF ACTION

64. Plaintiffs reallege the allegations contained in paragraphs 1 through 63, inclusive, as though fully set forth herein.

65. In doing the acts alleged herein, Defendants, and each of them, were motivated by racial and ethic hatred against Plaintiffs, and said acts constitute discrimination against Plaintiffs on the basis of race, Plaintiffs being of Palauan descent, thereby denying Plaintiffs Equal Protection and Due Process of Law as secured by the Fifth and Fourteenth Amendment to the United states Constitution.

66. Said acts have developed into a policy of De Facto Discrimination of the GPD (DPS), Government of Guam.

67. Said acts constitute a violation of 42 USC 1981, 1983, 1985 and 1986 and 48 USC 1421 (b) (e) (u).

WHEREFORE, Plaintiffs pray judgment as set forth below.

ELEVENTH CAUSE OF ACTION

68. Plaintiffs reallege the allegations contained in paragraphs 1 through 67, inclusive, as though fully set forth herein.

69. Defendants, Department of Public Safety and the Government of Guam, negligently employed and retained in their employ the individual Defendants, and each of them, although said entities knew, or in the exercise of reasonable care should have known, that said individually named Defendants have violent propensities and were not temperamentally suited to the position of police officers and thereby created a substantial risk of harm to Plaintiffs and the general public.

70. As a proximate result of said negligence of Defendants Department of Public Safety and Government of Guam, Plaintiffs suffered damage as herein alleged.

WHEREFORE, Plaintiffs pray as set forth below:

PRAYER

Plaintiffs Alex Ngiraingas, Oscar Ongklungel, Jimmy Moses, Arthur Mechol, Jonas Ngeheed, and Bolandis Ngiraingas prays for judgment, individually, jointly and severally, against all Defendants for:

1. Compensatory damages in the amount of $50,000,000.00;

2. Punitive damages in the amount of $50,000,000.00;

3. Costs of suit incurred herein;

4. Reasonable attorney's fees;

5. Interest at the legal rate; and

6. Such other and further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial by jury.

Respectfully submitted this 3 day of June, 1986

THE LAW OFFICES OF
GILL & SIEGEL. P.C.
Attorneys for Plaintiffs.

By: /s/ Jeffrey R. Siegel
JEFFREY R. SIEGEL

IN THE DISTRICT COURT OF GUAM
TERRITORY OF GUAM

ALEX NGIRAINGAS, et al., Plaintiffs, vs. FRANCISCO S. SANCHEZ, et al., Defendants.	D.C. Civil Case No. 85-0064 ANSWER TO THIRD AMENDED COMPLAINT FILED June 16, 1986

Defendants Jose T. Terlaje, Joe P. Balajadia, Elmer F. Sardoma and Judith P. Guthertz answer Plaintiff's First Amended Complaint as follows:

1. As to paragraphs 8, 9, 10, 11, 12 and 13, it is admitted that Francisco A. Sanchez, Joseph A. San Nicolas, Joseph R. Cruz, Jose T. Terlaje, Jose D. Balajadia and Elmer F. Sardoma, at all times relevant were citizens of the United States, residents of the territory of Guam and duly appointed police officers of the Guam Police Department, Government of Guam formerly the Department of Public Safety (DPS), Government of Guam.

2. As to paragraph 14, it is admitted that Judith P. Guthertz, at all times relevant, was a citizen of the United States, a resident of the Territory of Guam, and the duly appointed director of the Department of Public Safety, (now Guam Police Department) Government of Guam.

3. As to paragraph 15, it is admitted that the Government of Guam is the duly constituted government of the Territory of Guam and through the Guam Police

Department is the employer of Francisco Q. Sanchez, Joseph A. San Nicolas, Jose R. Cruz, Jose T. Terlaje.

4. As to paragraph 17, it is admitted that in the morning on or about March 31, 1985, officers of the Department of Public Safety arrested Alex Ngiraingas, Oscar Ongklungel, Jimmy Moses, Arthur Mechol and Jones Ngeheed.

5. As to paragraph 18, it is admitted that the plaintiffs were transported by police officers to the 7th floor of Pedro's Plaza in Agana, Guam.

6. As to paragraph 27, said defendants deny that the plaintiff was assaulted. Said defendants have insufficient knowledge or information to form a belief as to the truth of the other allegations in Paragraph 27.

7. As to paragraph 56, it is admitted that Plaintiffs have filed a claim with the Government of Guam and the Government of Guam has denied the claim.

8. As to paragraphs 2, 3, 4, 5, 6, 7, 22, 38, 43, and 48, said defendants have insufficient knowledge or information to form a belief as to the truth of the allegations.

9. Said defendants deny each and every allegation not specifically admitted above.

DEFENSES

1. The complaint fails to state a claim upon which relief can be granted.

2. The said defendants acted in good faith.

3. The said defendants are immune from this action.

4. The relief asked for it not a proper remedy.

5. This action is barred by the statute of limitations.

6. Plaintiffs are not entitled to a jury trial to their claims against the Government of Guam.

WHEREFORE, defendants pray that:

1. Plaintiffs take nothing from said defendants by this action;

2. Said defendants be awarded their costs and attorney fees; and

3. For such other relief as the court deems proper.

Dated: 6-13-86.

RICHARD G. OPPER
Attorney General

By: /s/ PATRICK MASON
PATRICK MASON
Assistant Attorney General

IN THE DISTRICT COURT OF GUAM
TERRITORY OF GUAM

ALEX NGIRAINGAS, et al., Plaintiffs, vs. FRANCISCO Q. SANCHEZ, et al., Defendants.	CIVIL CASE NO. 85-0064 MOTION AND NOTICE OF MOTION FILED AUGUST 18, 1986

MOTION

Defendants Terlaje, Balajadia, Sardoma, Guthertz, the Guam Police Department and the Government of Guam move the court for an order dismissing plaintiffs' complaint under Rule 12(b) of the Federal Rules of Civil Procedure for lack of jurisdiction over the subject matter and for a summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The grounds for this motion are that the Government of Guam, the Guam Police Department and the individuals, as defendants in their official capacity, are immune from plaintiffs' claims under 42 U.S.C. §§ 1981, 1983, 1985 and 1986; the claims against the persons being sued in their individual capacities are barred by the statute of limitations; and the Superior Court of Guam is the proper forum for plaintiffs to bring their tort claims.

NOTICE OF MOTION

To: ALL PARTIES AND THEIR ATTORNEYS

PLEASE TAKE NOTICE that the undersigned will bring the above motion for hearing on the 19th day of September, 1986 at 9:30 a.m. or as soon thereafter as the matter can be heard in the courtroom of the Honorable Cristobal C. Duenas, District Court of the Territory of Guam.

Dated this 15th day of August, 1986.

C. WILLIAM ULLRICH
Acting Attorney General

By: /s/ PATRICK MASON
PATRICK MASON
Assistant Attorney General

IN THE DISTRICT COURT OF GUAM
TERRITORY OF GUAM

ALEX NGIRAINGAS, et al., Plaintiffs, vs. FRANCISCO Q. SANCHEZ, et al., Defendants.	CIVIL CASE NO. 85-0064 JUDGMENT FILED OCTOBER 30, 1986

This matter came on for defendants', Jose T. Terlaje, Joe P. Balajadia, Elmer F. Sardoma, Judith Guthertz, Department of Public Safety (the Guam Police Department) and the Government of Guam, Motion for Summary Judgment and Motion to Dismiss before the Court, and the issues having been duly heard and a Memorandum Order having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED that defendants' Motion for Summary Judgment and Motion to Dismiss are granted as to all defendants.

Dated this 30th day of October, 1986.

/s/ CRISTOBAL C. DUENAS
CRISTOBAL C. DUENAS
Judge

IN THE DISTRICT COURT OF GUAM
TERRITORY OF GUAM

ALEX NGIRAINGAS, et al., Plaintiffs, vs. FRANCISCO J. SANCHEZ, et al., Defendants.	D.C. CASE #85-0064 NOTICE OF APPEAL FILED NOVEMBER 3, 1986

NOTICE IS HEREBY GIVEN that the Plaintiffs above named, hereby appeal to the United States Court of Appeals For The Ninth Circuit from the Judgment and Memorandum Order entered in this action on the 30th day of October, 1986.

Dated this 3rd day on November, 1986.

THE LAW OFFICES OF
GILL & SIEGEL, P.C.
Attorneys for Plaintiffs.
173 Aspinall Avenue
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By: /s/ JEFFERY R. SIEGEL
JEFFERY R. SIEGEL

PETITIONER'S

BRIEF

No. 88-1281

Supreme Court, U.S.
FILED
NOV 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

ALEX NGIRAINGAS, OSCAR ONGKLUNGEL, JIMMY MOSES, ARTHUR MECHOL, JONAS NGEHEED and BOLANDIS NGIRAINGAS,

Petitioners,

vs.

FRANCISCO Q. SANCHEZ, individually and as a Police Officer, JOSEPH R. CRUZ, individually and as a Police Officer, JOSE T. TERLAJE, individually and as a Police Officer, JOE P. BALAJADIA, individually and as a Police Officer, ELMER F. SARDOMA, individually and as a Police Officer, JOSEPH A. SAN NICOLAS, individually and as a Police Officer, JUDITH P. GUTHERTZ, in her Official Capacity as Director of the Department of Public Safety (Guam Police Department), THE GUAM POLICE DEPARTMENT and THE GOVERNMENT OF GUAM,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Territory of Guam is liable for its deprivations of Civil Rights inflicted pursuant to a policy or custom under the Civil Rights Act of 1871, 42 USC 1983?

a. Whether the Territory of Guam is a person for the purpose of 42 USC 1983?

b. Whether the Territory of Guam has sovereign immunity against an action brought pursuant to 42 USC 1983?

2. Whether officers of the Territory acting in their official capacities are liable for deprivations of Civil Rights inflicted under color of Territorial law?

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CITATIONS TO OPINIONS AND JUDGMENTS IN THE COURTS BELOW.

The Memorandum Order of October 30, 1986 was not reported. It is reprinted in the Petition for Writ of Certiorari, p.A1. The United States Court of Appeals for the Ninth Circuit reported its Decision at *Ngiraingas v. Sanchez*, 858 F.2d 1368 (1988), superseding 849 F.2d 372.

JURISDICTION

This case is brought on Petition for Writ of Certiorari by virtue of 28 USC 1254. The United States Court of Appeals issued its Amended Opinion and Order denying the Petition for Re-hearing on September 28, 1988. The Petition for Writ of Certiorari was filed by placing it in the mail within ninety (90) days of the denial of the Petition for Re-hearing, on December 20, 1988 and received by the Court on December 27, 1988.

STATUTES INVOLVED

42 USC 1983:

> Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State, Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The Third Amended Complaint filed in the District Court of Guam on June 4, 1986, alleges that the Plaintiffs, all of Palauan descent, were arrested on or about March 31, 1983 at approximately 6:35 a.m. (J.A. p.3, 7).

Upon interrogation, the Plaintiffs were forced through intimidation, threats, and physical beatings to sign "Rights Waiver" forms, and make self-incriminating statements concerning the subject of the arrest, which was possession of marijuana. *See* generally, J.A. pp.3-13. Some of the Plaintiffs were beaten to the floor, kicked repeatedly, and another had his head slammed against the cement wall of the police station rest room, where they were taken for their beatings. *See*, e.g. J.A. pp.12-14.

The Third Amended Complaint alleged that the actions of the officers and their supervisory personnel were taken,

> pursuant to a *de facto* policy of the Government of Guam, which is implemented by its Department of Public Safety Director (GPD), police officers, agents, personnel and employees to summarily punish persons, including Plaintiffs, who refuse to obey police orders, whether lawful or not, by means of excessive use of force, harassment, intimidation, violence and denial of the basic Civil and Constitutional rights.
>
> 54. The existence of the *de facto* policy has been known to and encouraged by supervisory and policy making officers and officials of the Department of Public Safety (GPD) and the Government of Guam for a substantial period of time.
>
> 55. Despite their knowledge of said illegal policy and practices, the supervisory and policy making officers and officials of said Department of Public Safety (GPD) and the Government of Guam have not taken steps to terminate said practices, have not disciplined or otherwise properly supervised the individual officers, agents, employees and personnel who engaged in the said practices, have not effectively trained them with regard to proper Constitutional and statutory limits on the exercise of their authority, and have instead sanctioned, condoned and ratified the policy and practices described herein, through their deliberate and callous indifference to the Civil and Constitutional rights of the persons in their custody including Plaintiffs. (J.A. pp.16-17).

The Defendant Government of Guam and various officers in their official capacities brought a Motion and Notice of Motion to Dismiss or for Summary Judgment on August 18, 1986 on the grounds that "the Government of Guam, the Guam Police Department and the individuals, as Defendants in their official capacities, are immune from Plaintiffs' claims under 42 USC 1981, 1983, 1985 and 1986; the claims against the persons being sued in their individual capacities are barred by the statute of limitations; and the Superior Court of Guam is the proper forum for Plaintiffs to bring their tort claims." (J.A. p.25).

The hearing on the Motion was held on September 19, 1986, and a Memorandum Order of the District Court of Guam was filed on October 30, 1986, holding that the Territory of Guam and the individual officers acting in their official capacity were immune from the Federal Civil Rights Act. (Reprinted in Petition for Writ of Certiorari, p.A1). Judgment was entered on the same date. (J.A. p.27). Notice of Appeal was timely filed on November 3, 1986. (J.A. p.28).

The United States Court of Appeals for the Ninth Circuit filed its Opinion on June 7, 1988, affirming in part,

and reversing in part. (Reprinted in Petition for Writ of Certiorari, p.A17). The Petitioners applied for rehearing, which was denied by the United States Court of Appeals for the Ninth Circuit in its Amended Opinion and Order of September 28, 1988. The amendments were minor in nature. The United States Court of Appeals for the Ninth Circuit held that Guam was not a person for the purpose of 42 USC 1983, and therefore did not reach the question of whether Guam enjoys sovereign immunity pursuant to the Eleventh Amendment. *See, Ngiraingas v. Sanchez,* Amended Opinion and Order, Petition for Writ of Certiorari, p.A42, n.2. The Ninth Circuit further held that the individual Defendants enjoy a good faith immunity. Additionally, the Court of Appeals reversed the District Court of Guam with respect to its dismissal of the individual officers based on the statute of limitations.

The Plaintiffs petitioned this Court for a Writ of Certiorari with respect to the issue of whether Guam is liable for its violations of Civil Rights pursuant to 42 USC 1983. In the event that this Court rules that the Territory of Guam is liable under 42 USC 1983, it is Petitioners' position that the individual officers acting in their official capacities will not have any greater sovereign immunity than the Territory itself, but will enjoy a good faith immunity. *Pierson v. Ray,* 386 US 547 (1967). However, it is conceded that should this Court hold that Guam is not a person, or is otherwise immune from liability under Section 1983, then the officers acting in their official capacities shall have immunity to the same extent as the Government. *Pennhurst State School and Hospital v. Halderman,* 465 US 89, 101-102 (1984). *Will v. Michigan Department of State Police,* ___ US ___, 109 S.Ct. 2304, 2311 (1989).

SUMMARY OF ARGUMENT

1. The Petitioners contend that the Territory of Guam is a person for the purpose of Section 42 USC 1983 by the reasoning of this Court in *Monell v. City of New York Department of Social Services,* 436 US 658 (1978). *Will v. Michigan Department of State Police,* ___ US ___, 109 S.Ct. 2304 (1989) holding that States are not persons for purpose of Section 1983, was grounded in the interests of Federalism and the Eleventh Amendment, and employed clarity of legislative intention requirements which are applicable only when the Constitutional balance is at stake. Since there are no interests of Federalism with respect to Territories, and the Eleventh Amendment does not apply to Guam, *Will* does not provide support for the argument that Guam is not a person or subject to liability under Section 1983.

The Third Circuit has taken the view that the Territory of the Virgin Islands is liable under Section 1983. *Frett v. Government of Virgin Islands,* 839 F.2d 968, 977 (3rd Cir. 1988). The Ninth Circuit has held that the Commonwealth of the Northern Marianas is also liable under Section 1983. *Fleming v. Department of Public Safety,* 837 F.2d 401 (9th Cir. 1988). However, Puerto Rico has been held not to be a person. *Ezratty v. the Commonwealth of Puerto Rico,* 648 F.2d 770 (1st Cir. 1981), on the grounds of the Eleventh Amendment. Petitioners argue that the Eleventh Amendment should not be applied to the Territory of Guam, and indeed is inapplicable on its face to the Commonwealth of Puerto Rico.

2. The Territory of Guam has no sovereign immunity from an action under 42 USC 1983. There are two possibilities for a source of sovereign immunity for the

Territory, either *Kawananakoa v. Polyblank*, 205 US 349 (1907), and cases relying on it, or Guam's Organic Act. 48 USC 1421(a). *Kawananakoa* only supports the proposition that a Territory is immune from Territorial law, and not from Federal actions or for actions in Federal Courts. Cases which have expanded the doctrine to include Federal actions, or immunity in Federal Courts, are unreasoned and incorrect. With respect to the immunity conferred in the Organic Act, Congress would not have applied a Bill of Rights, or specifically applied the Fifth and Fourteenth Amendments to the Territory of Guam in the Organic Act, and intended to provide immunity from actions designed to enforce those rights. *See, Ocasio v. Bryan*, 374 F.2d 11 (3rd Cir. 1967); *Frett v. Government of Virgin Islands*, 839 F.2d 968 (3rd Cir. 1988).

I

THE TERRITORY OF GUAM IS LIABLE FOR ITS DEPRIVATIONS OF CIVIL RIGHTS INFLICTED PURSUANT TO A POLICY OR CUSTOM UNDER THE CIVIL RIGHTS ACT OF 1871, 42 USC 1983.

42 USC 1983 states:

> Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State, Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable to the District of Columbia shall be considered to be a statute of the District of Columbia.

Preliminarily, the allegations in the Complaint are sufficient to state a cause of action under Section 1983. *City of Oklahoma City v. Tuttle*, 471 US 808 (1985). Section 1983 applies in Guam. *Bunyan v. Camacho*, 770 F.2d 773 (9th Cir. 1985) cert. den., 477 US 903 (1986). *Fleming v. Department of Public Safety*, 837 F.2d 401 (9th Cir. 1988), cert. den. 109 S.Ct. 222. *Torres v. Commonwealth of Puerto Rico*, 442 US 465 (1979); *District of Columbia v. Carter*, 409 US 418 (1973).

Additionally, by virtue of both the rulings of this Court and the Organic Act of the Unincorporated Territory of Guam, 48 USC Section 1421 *et. seq.*, the rights of Due Process and Equal Protection, which form the basis of this action have been extended to the Territory of Guam and are fully applicable. *See, Colero-Toledo v. Pearson Yacht Leasing Company*, 416 US 663 (1974); *Examining Board v. Flores de Otero*, 426 US 572 (1976).

The Organic Act of Guam extends a Bill of Rights to the people of Guam, 48 USC Section 1421(b), which includes the right to Due Process and Equal Protection of the law.

> No person shall be deprived of life, liberty, or property without due process of law. 48 USC Section 1421(e) . . .
>
> No discrimination shall be made in Guam against any person on account of race, language, or religion, nor shall the equal protection of the laws be denied. 1421(b)(e).

Furthermore, Congress provided for the application of portions of the Constitution. 48 USC Section 1421(b)(u) states in full:

> The following provisions of and amendments to the Constitution of the United States are hereby

> extended to Guam to the extent that they have not been previously extended to that Territory and shall have the same force and effect there as in the United States or in any state of the United States: article I, section 9, clauses 2 and 3; article IV, section 1 and 2, clause 1; The first to ninth Amendments inclusive; The thirteenth Amendment; The second sentence of section 1 of the fourteenth Amendment; The fifteenth and nineteenth Amendments.
>
> All laws enacted by Congress with respect to Guam and all laws enacted by the territorial legislature of Guam which are inconsistent with provisions of this subsection are repealed to the extent of such inconsistency.

Congress may extend Constitutional provisions to the Territories.

> Congress may make Constitutional provisions applicable to territories in which they would not otherwise be controlling. *Mullaney v. Anderson*, 342 US 415, 419-420, 72 S.Ct. 428, 431, 96 L.Ed. 458 (1952) . . . However, because the limitations on the application of the Constitution in unincorporated territories is based in part on the need to preserve Congress's ability to govern such possessions, and may be overruled by Congress, a legislative determination that a Constitutional provision practically and beneficially may be implemented in a territory is entitled to great weight. *Torres v. Commonwealth of Puerto Rico*, 442 US 465, 470 (1979).

The conclusions reached thus far have not been challenged by any party below.

(A)

THE TERRITORY OF GUAM IS A PERSON FOR THE PURPOSE OF 42 USC 1983.

The Court has decided two cases determining whether governmental entities are "persons" within the meaning of Section 1983, *Monell v. City of New York Department of Social Services*, 436 US 658 (1978) and *Will v. Michigan Department of State Police*, ___ US ___, 109 S.Ct. 2304 (1989).

In *Monell*, the City of New York Department of Social Services and Board of Education compelled pregnant women to take unpaid leaves of absence prior to the time such leaves were required for medical reasons. 436 US at 661. Through a review of the legislative history of Section 1983, the Court concluded that "Congress did intend municipalities and other local government units to be included among those persons to whom Section 1983 applies." *Monell*, 436 US at 690. Sections 1(a) and 1(b) of the Opinion in *Monell* is an analysis of issues which are irrelevant to the issue now before the Court, specifically, whether Congress considered itself empowered to impose the obligations of the Civil Rights Act upon municipalities, as well as make such entities liable for damages. Article IV, Section 2, Clause 2 of the United States Constitution states in relevant part:

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; . . .

This provision is the source of Congress's plenary authority over Territories.

> All territory within the jurisdiction of the United States not included in any State must,

necessarily, be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying dominion of the United States. They bare much the same relation to the general government that counties do to the States, and Congress may legislate for them as States do for their respective municipal organizations. The organic law of the Territory takes the place of a Constitution, as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme and, for the purposes of this Department of its governmental authority, has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution. *First National Bank of Brunswick Maine v. County of Yankton*, 101 US 129, 133 (1880).

A dependency has no government but that of the United States, except insofar as the United States may permit. The national government may do for one of its dependencies whatever a state might do for itself or one of its political subdivisions, since over such a dependency the nation possesses the sovereign powers of the general government plus the powers of a local or state government in all cases where legislation is possible. *Cincinnati Soap Company v. United States of America*, 301 US 308, 317 (1937).

"The powers vested in Congress by Const., Article IV, Section 3, Clause 2 to govern territories are broad." *Examining Board v. Flores de Otero*, 426 US 572, 586 n.16.

The issues addressed in the Insular Cases, *see, Downes v. Bidwell*, 182 US 244 (1901); *Dorr v. United States*, 195 US 138 (1904); *Balzac v. Porto Rico*, 258 US 298 (1922), need not be addressed since Congress has applied the rights in question legislatively. In any event, "neither the cases nor their reasoning should be given any further expansion." *Reid v. Covert*, 354 US 1, 14 (1957).

The question now is whether Congress intended to include unincorporated Territories within the scope of the word "persons." Commencing Section 1(c) of *Monell*, the Court states:

> The question remains, however, whether the general language describing those to be liable under Section 1 – 'any person' – covers more than natural persons. An examination of the debate on Section 1 and application of appropriate rules of construction show unequivocally that Section 1 was intended to cover legal as well as natural persons.

The inference made by the Court is based, to an extent, on the philosophy that the construction of a statute securing civil liberties and rights should be as broad as possible, and this was the understanding of the enacting Congress.

> This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and Constitutional provisions authorizing such statutes are liberally and beneficially construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and Constitutional provisions as are meant to protect and defend and give remedies for the wrongs to all the people. *Monell*, 436 US at 684, citing speech of Representative Shellabarger, Congressional Globe, 42nd Congress, 1st Session, Appendix, at 68. (Hereinafter "Globe.")

The Court infers, from the great breadth Congress intended to provide to Section 1983 that "since municipalities through their official acts could, equally with

natural persons, create the harms intended to be remedied by Section 1, and, further, since Congress intended Section 1 to be broadly construed, there is no reason to suppose that municipal corporations would have been excluded from the sweep of Section 1." *Monell*, 436 US 685-686.

Furthermore, in support of its ruling that municipalities are included within Section 1983, the Court relies on the Dictionary Act "which had been passed only months before the Civil Rights Act was passed." *Monell*, 436 US at 688:

> . . . in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense. Act of February 25, 1871, Section 2, 16 Stat. 431. *Monell*, 436 US at 688.

The unincorporated Territory of the Virgin Islands is a body politic, *In Re: Hooper's Estate*, 359 F.2d 569 (3rd Cir. 1966), and since Guam has been granted the power by Congress to legislate over matters of local importance through the Organic Act, it is also a body politic

> Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom Section 1983 applies. Local governing bodies therefore, can be sued directly under Section 1983 for monetary, declaratory, or injunctive relief where, as here, the action alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of a Section 1983

> action against a government body is an allegation that the official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other Section 1983 'person' by the very terms of the statute, may be sued for government 'custom' even though such a custom has not received formal approval through the body's official decision making channels. *Monell*, 436 US 690-691.

Furthermore, the Civil Rights Act was,

> intended to provide a remedy, to be broadly construed against all forms of official violation of federally protected rights. Therefore, absent a clear statement in the legislative history supporting the conclusion that Section 1 was not to apply to the official acts of a municipal corporation – which simply is not present – there is no justification for excluding municipalities from the 'persons' covered by Section 1. *Monell*, 436 US at 700.

Similarly, there is no clear statement excluding Territories from the definition of "persons."

As enacted in 1871, the Civil Rights Act applied only to acts taken under color of State law. However, pursuant to the Territories clause, Congress added without explanation the words "or Territory" in the 1874 codification of the United States statutes. *Examining Board v. Flores de Otero*, 426 US at 582. "The evident aim was to ensure that all persons residing in the Territories not be denied, by persons acting under color of territorial law, rights guaranteed them by the Constitution and laws of the United States." *id*. The legislative history of the Civil Rights Act of 1871 demonstrates that Congress did have Territories, and even future Territories of the United States, in mind when it considered the implications of the Civil Rights Act. Representative Bingham said:

Liberty secured by law is not license. Liberty, our own American Constitutional liberty, is the right 'to know, to argue, and to utter freely according to conscience.' It is the liberty, sir, to know your duty and to do it. It is the liberty, sir, to work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellow men, and to be secure in the enjoyment of the fruits of your toil. Justice, sir, to establish which this Constitution was ordained, the people themselves being witness, is to give to every man his due. The justice to be established by the Constitution is the attribute of God, as to do justice is the perpetual obligation of men and nations. *Let justice for all, by the power and majesty of American law be established for all, so that the poorest man in his hovel on the frontiers of your widely extended domain, bearing with him toward the setting sun, symbols of civilization, and laying in the wilderness the foundation of new commonwealths, may be made as secure in his person and property as the prince in his palace or the king on his throne.* Remarks of Representative Bingham, Globe Appendix, p.86. (Emphasis Added).

Representative Bingham also notes his understanding that the question is whether Congress can, and the Civil Rights Act will, extend to "every individual citizen of the Republic in every State and Territory of the Union to the extent of the rights guaranteed to him by the Constitution." Globe, Appendix, p.81.

Therefore, given the broad sweep and liberal interpretation of the Civil Rights Act, the same inference drawn for municipalities should be drawn for Territories since there is no "clear statement in the legislative history supporting the conclusion that Section 1 was not to apply

to the official acts of a municipal corporation (or Territory) . . . there is no justification for excluding municipalities (or Territories) from the 'persons' covered by Section 1." *Monell*, 436 US at 700.

Greater understanding of the scope of Section 1983 was provided by this Court in *Will v. Michigan Department of State Police*, ___ US ___, 109 S.Ct. 2304 (1989). In that case, the Court held that neither States nor State officials were persons for the purpose of Section 1983. 109 S.Ct. 2307-2308. However, although the Eleventh Amendment did not apply in *Will*, (*Will*, 109 S.Ct. at 2307), both the nature of Federalism and the Eleventh Amendment informed the Court's decision. It is therefore wise at this point to discuss the applicability of these concepts to Guam.

The Organic Act declared Guam to be an "unincorporated Territory of the United States." 42 USC Section 1421(a).

> The Eleventh Amendment provides:
> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

The Eleventh Amendment is a limitation upon the judicial power of the United States and extends to suits in which a citizen of the State sues his own State in Federal Court. *Hans v. Louisiana*, 134 US 1 (1890). Therefore, the language of the Eleventh Amendment does not limit the judicial power of the United States with respect to any entities other than States.

The Eleventh Amendment does not apply to Guam. *Sakamoto v. Duty Free Shoppers, Ltd.*, 613 F.Supp. 381 (D.C. Guam 1983) affirmed 764 F.2d 1285 (1985). The Eleventh

Amendment does not apply to the unincorporated Territory of the Virgin Islands. *Tonder v. MV Burkholder*, 630 F.Supp. 691 (D.C. V.I. 1986). The Eleventh Amendment does not apply to the Commonwealth of the Northern Marianas Islands. *Fleming v. Department of Public Safety*, 837 F.2d 401 (9th Cir. 1988). But *See, Ezratty v. Commonwealth of Puerto Rico*, 648 F.2d 770 (1981), (holding that the Eleventh Amendment applies to the Commonwealth of Puerto Rico). This Court has held that Territories are not States for the Fourteenth Amendment purposes. *District of Columbia v. Carter*, 409 US 418, 422 n.11 (1973).

Indeed, there is no reason to believe that the Framers of the Eleventh Amendment intended to apply it to Territories. The Eleventh Amendment was adopted as a response to *Chisholm v. Georgia*, 2 US (Dall.) 419 (1793), which held a State liable to suit by a citizen of another State or a foreign country. The intention was to Constitutionally protect State sovereignty. *See, Edleman v. Jordan*, 415 US 651, 663 (1974). No such notions of Federalism as underlie the limitations of Federal judicial power are applicable to the Territories. *Pan American World Airways v. Government of the Virgin Islands*, 459 F.2d 387 (3rd Cir. 1972).

However, other than the language of the provision, the most persuasive evidence that Congress did not intend the Eleventh Amendment to apply to the Territory of Guam is its absence in the Constitutional provisions which were extended to Guam under the Organic Act. *See* 48 USC Section 1421(b)(u) cited above.

As Justice Brennan notes in his dissent in *Will v. Michigan Department of State Police*, ___ US ___, 109 S.Ct. 2304, 2312, the Eleventh Amendment plays an important role in the Court's analysis. However, it is also the respect

for States' Rights and Federalism embodied in the Eleventh Amendment which determines the result in *Will*. "Since Guam is an unincorporated territory and drawing only such powers as may be delegated to it by the Congress in the Organic Act of Guam, 48 USC Section 1421(a), the Government of Guam is in essence an instrumentality of the Federal government. *See, United States v. Wheeler*, 435 US 313, 320-321, 98 S.Ct. 1079, 1084-1085, 55 L.Ed.2d 303 (1978)." *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1286 (9th Cir. 1985) cert. den. 475 US 1081 (1986).

The intention of Congress with respect to including Territories within the scope of Section 1983 in no manner touch upon Federalism or the intrusion of Federal authority into the Territory, as the legislative history of Section 1983 demonstrates was the main concern with respect to States. Therefore, as shall be more fully demonstrated, *Will* does not limit the breadth of Section 1983 as explained in *Monell*, with respect to Territories. Indeed, it is inconsistent with reason and common sense to hold that Section 1983 is inapplicable to a State because of its sovereignty, and the lack of clarity of Congressional intent required to change the Constitutional balance between States and the Federal government (*see* below), and also hold that Section 1983 is inapplicable to a Territory because it lacks sovereignty, and is a mere instrumentality of the Federal government, *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285 (9th Cir. 1985) and is essentially under the plenary control of Congress. *First National Bank of Brunswick Maine v. County of Yankton*, 101 US 130 (1880). Furthermore, it is anomalous to hold that the Territory of Guam, which is an instrumentality of the Federal government and is under its plenary control, is

exempt or immune from Federal law, or immune from suit in a Federal Court.

In reaching its holding in *Will v. Michigan Department of State Police, supra,* this Court relies on several considerations. First, the Court stated:

> We observe initially that if a State is a 'person' within the meaning of Section 1983, this Section is to be read as saying that 'every person, including a State, who under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects . . . ' That would be a decidedly awkward way of expressing an intent to subject the States to liability. *Will v. Michigan Department of State Police,* 109 S.Ct. at 2308.

But the Court continues:

> This approach is particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before. 109 S.Ct. at p.2308.

That consideration is inapplicable here, in the context of Territories. Since this rule is no longer "particularly applicable" it is no more awkward to read Section 1983 to say that " 'every person,' (including the District of Columbia or including a Territory, or including a municipality), who under color of any statute subjects . . ." Indeed, the District of Columbia is liable under Section 1983, *Carter v. District of Columbia,* 795 F.2d 116 (D.C. Cir. 1986), as is the unincorporated Territory of the Virgin Islands, *Frett v. Government of Virgin Islands,* 839 F.2d 968 (3rd Cir. 1988) and as is the Commonwealth of the Northern Marianas Islands. *Fleming v. Department of Public Safety,* 837 F.2d 401 (9th Cir. 1988) cert. den. 109 S.Ct. 222.

Second, the Court indicates that "the language of Section 1983 also falls far short of satisfying the ordinary rule of statutory construction that if Congress intends to

alter the 'usual Constitutional balance between the States and the Federal government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' (Citation)." 109 S.Ct. at 2308. No such Constitutional balance is at issue with respect to Territories, and therefore this consideration is inapplicable.

Third, the Court noted that the conclusion that a State is not a person within the meaning of Section 1983 is "reinforced by Congress's purpose in enacting the statute." 109 S.Ct. at 2309. Since "Congress assigned to the Federal courts a paramount role" *id.,* to remedy Constitutional deprivations, and the Eleventh Amendment barred such damage suits in Federal Court, the Congress would not have intended "to create a cause of action against States to be brought in state courts." *id.* Again, this consideration is inapplicable since a Territory has no protection under the Eleventh Amendment.

Fourth, the Court notes that "in deciphering Congressional intent as to the scope of Section 1983, the scope of the Eleventh Amendment is a consideration, and we decline to adopt a reading of Section 1983 that disregards it." 109 S.Ct. at 2309. This factor weighs in favor of subjecting the Territory of Guam to liability under Section 1983. If the scope of the Eleventh Amendment is coextensive with the scope of Section 1983, then there is no question that the Territory is not subject to liability. This Court notes that it is a consideration, and it is a logical one. The availability of a Federal forum to hear a Federal question seems naturally to be related. But *see, Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare, State of Missouri,* 411 US 279, 287 (1973) (concurrence Marshall J.).

The fifth consideration used by the Court is that Congress did not intend to override common law principles such as the doctrine of sovereign immunity when it enacted Section 1983. 109 S.Ct. at 2309. We leave this discussion to the next section concerning sovereign immunity.

Sixth, the Court relies upon the legislative history to hold that States are not persons. However, the Court explicitly employs a careful scrutiny because of the clarity required to alter the usual Constitutional balance. "And surely nothing in the debates rises to the clearly expressed legislative intent necessary to permit that construction." *Will*, 109 S.Ct. at 2310. Again, in the context of Territories, no Constitutional balance is involved, and no "clearly expressed legislative intent" is necessary. The same considerations which this Court employed in *Monell*, and the additional citation to the legislative history above, are sufficient to provide the inference that Congress intended the broadest practical scope to apply to an action under Section 1983, and that Territories are within that scope. Nothing in *Will* contradicts this conclusion. *Will* re-affirms that the special status of States in the Constitutional and Federalist systems requires Congress to clearly express its intention to change that status. It does not say that for Territories, in which Federalism takes no interest, any such clear intention need be shown. In fact, a holding that a Territory is not a person under Section 1983 would require a "clear statement in the legislative history supporting (that) conclusion," *Monell*, 436 US at 700, as it would for a municipal corporation. One searches in vain for any such clear statement excluding the Territories.

Seventh, the Court refers to the Dictionary Act which was discussed above in reference to *Monell*. However, in note 9 at 109 S.Ct. 2311, the Court once again demonstrates that it is the "clear showing" requirement which determines its interpretation.

> . . . To the extent Justice Brennan's citations of other authorities do not suffer from the same confusion, those authorities at best suggest that the phrase is ambiguous, which still renders the Dictionary Act incapable of supplying the necessary clear intent. *Will*, 109 S.Ct. at 2311, n.9.

However, this level of ambiguity would not be sufficient to demonstrate that the definitions in the Dictionary Act of "body politic and corporate" do not apply to Territories, since a clear statement in the legislative history would be required to exclude Territories from the scope of Section 1983 because no Constitutional balance is in issue. *Monell*, 436 US at 700.

Finally, the Court directly addresses itself to the argument that *Monell* requires States to be included within Section 1983. The Court draws the distinction directly upon the Eleventh Amendment:

> Finally, *Monell* itself is not to the contrary. True, prior to *Monell*, the Court had reasoned that if municipalities were not persons then surely States also were not. *Fitzpatrick v. Bitzer*, 427 US at 452, 96 S.Ct. at 2669. And *Monell* overruled *Monroe* (*Monroe v. Pape*, 365 US 167 (1961)), undercutting that logic. But it does not follow that if municipalities are persons then so are States. States are protected by the Eleventh Amendment while municipalities are not, *Monell*, 436 US at 690, n.54, 98 S.Ct. at 2035, n.54, and we consequently limited our holding in *Monell* to local government units which are not considered part of the State for Eleventh Amendment purposes. Conversely, our holding here does not

> cast any doubt on *Monell*, and applies only to States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes. (Citation). *Will*, 109 S.Ct. at 2311.

Territories are not States or governmental entities that are considered "arms of the State" for Eleventh Amendment purposes. As demonstrated above, the Eleventh Amendment has no applicability to Territories, and given the fact that this is the only distinction made by this Court with respect to the applicability of *Monell* to States, the conclusion logically follows that since the Eleventh Amendment is inapplicable to Territories as well, then the Territory of Guam is subject to liability under Section 1983.

The Third Circuit takes the view that the unincorporated Territory of the Virgin Islands is liable under Section 1983. *Ocasio v. Bryan*, 374 F.2d 11 (3rd Cir. 1967) was decided prior to *Monell*, and therefore Section 1983 was not understood to impose liability upon governmental entities. However, Section 2(b) of the revised Organic Act of the Virgin Islands extended the sovereign immunity of the Virgin Islands to both the Government of the Virgin Islands or "any officer or employee thereof in his official capacity . . . " *Ocasio*, 374 F.2d at 13. The Third Circuit notes, in accord with *Monroe v. Pape*, 365 US 167 (1961), that Section 1983 liability runs against the individual officer and not against the governmental entity. However, addressing the argument that the sovereign immunity granted to the Territory of the Virgin Islands and its officials in its Organic Act is effective to bar a Section 1983 action against its officers, the Court stated:

> It is difficult to believe that in adopting what in effect is the Constitution of the Virgin Islands the same Congress which provided a Bill of

> Rights taken from the Constitution of the United States would have intended at the same time silently to work the repeal of the Civil Rights Act of 1871. Far from indicating any such intention, Section 2(b) plainly harmonizes with the right to enforce the Civil Rights Act of 1871 in the Territory of the Virgin Islands. *Ocasio*, 374 F.2d at 13-14.

However, after *Monell*, the Third Circuit once again had the opportunity to discuss the applicability of Section 1983 directly against the Territory. The Third Circuit stated as follows:

> In *Ocasio v. Bryan*, 374 F.2d at 11, this Court rejected the contention that the enactment of Section 2(b) of the Organic Act was a *pro tonto* repeal of the Civil Rights Act of 1871, holding that the Organic Act's reference to suits 'against any officer or employee thereof in his official capacity' referred only to 'official capacity' suits. Prior to *Ocasio v. Bryan*, the Government of the Virgin Islands probably could not have been sued in a Section 1983 action. *See, Monroe v. Pape*, 365 US 167, 187, 81 S.Ct. 473, 484, 5 L.Ed.2d 492 (1961) (governmental entity not a person within the meaning of Section 1983). This statute was reinterpreted in *Monell v. Department of Social Services of the City of New York*, 436 US 658 . . . (1978). (Citations). *Frett v. Government of Virgin Islands*, 839 F.2d 968, 977 (3rd Cir. 1988).

The Court rejected the Government of the Virgin Islands' argument that Section 1983 liability was restricted to that consented to under the Tort Claims Act.

> While *Ocasio v. Bryan* is technically not dispositive, that Court's interpretation of Section 2(b) of the Organic Act which it announced, permitting the application of Section 1983 in the Virgin

> Islands, is strongly suggestive. Attributing to the 1954 Congress, which passed the Organic Act, an intention to confer on the Government of the Virgin Islands, an immunity from tort actions based on the Constitution and laws of the United States greater than that enjoyed by the states and their subdivisions would be inconsistent with Section 1983 purposes. (Citation). *Frett*, 839 F.2d at 977.

In *Fleming v. Department of Public Safety*, 837 F.2d 401 (9th Cir. 1988), the Ninth Circuit held that the Commonwealth of the Northern Marianas Islands was a person for the purpose of Section 1983. Although some of the reasoning of the Ninth Circuit is undercut by this Court's decision in *Will*, there are still lessons to be learned. First, the Ninth Circuit holds that the Eleventh Amendment is inapplicable to the Commonwealth for much the same reason that Petitioners argue it is inapplicable to Guam, specifically, that Congress omitted it in the provisions applying specific Constitutional provisions to the Commonwealth. "As the Supreme Court long ago observed, 'in an instrument well drawn, as in a poem well composed, silence is sometimes most expressive.' *Chisholm v. Georgia*, 2 US (2 Dall.) 419, 454, 1 L.Ed. 440 (1793) (Opinion of Wilson, J.)." *Fleming*, 837 F.2d at 405.

The Ninth Circuit further concludes that the Commonwealth is a person under Section 1983 because it interpreted *Quern v. Jordan*, 440 US 332 (1979) to limit "the applicability of Section 1983 to States solely upon the force of the Eleventh Amendment." *Fleming*, 837 F.2d at 406. This is a reasonable conclusion drawn from *Quern* but *Will* makes clear the Eleventh Amendment is not the sole limit of applicability. As a practical matter, however, the conclusion is the same. States are not liable under Section 1983, but this does little to limit the applicability

of Section 1983 to the Commonwealth, or to the Territory. Although dressed in terms of the Eleventh Amendment, which is inapplicable to the Commonwealth of the Northern Mariana Islands and Guam, the foundation for these decisions is Federalism, as Federalism is the basis of the Eleventh Amendment. The Eleventh Amendment protects States because of the Federalist concept that States are a separate sovereign. It is an expression and limitation on the Federal judicial power, and nothing more. Although the scope of Section 1983 and the Eleventh Amendment are separate issues, *Will*, 109 S.Ct. at 2309, the scope of the ~~Eleventh~~ Amendment "is a consideration . . . " *id.* Albeit the rift does not close perfectly, it is not a big leap, and it is consistent with reason and with Federalism as embodied in the Eleventh Amendment, to hold that all governmental entities other than States are persons under Section 1983. There is no reason to change this result, and nothing in *Will* should convince the Court to change it.

Constitutionally, the District of Columbia is not unlike Territories. Article I, Section 8, Clause 17 of the United States Constitution states in part:

> The Congress shall have the power . . . to exercise exclusive legislation in all cases whatsoever, over such district . . . as may, by cession of particular States, and the acceptance of Congress, become the seat of government of the United States, and to exercise all like authority over all places purchased by the consent of the legislature of the State in which the same shall be . . .

Both entities have been described as instrumentalities of the Federal government. *District of Columbia v. Carter*, 410 US 958 (1973); *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285 (9th Cir. 1985). Congress has plenary power

over the District of Columbia. *Palmore v. US*, 411 US 389 (1973).

Although a distinction was made by the Court between the Territory of Hawaii and the District of Columbia in *Kawananakoa v. Polyblank*, 205 US 349 (1907), it rested on the premise that Congress was still legislating for the District of Columbia, and it did not have its own legislature as Hawaii did.

> The District of Columbia is different, because there the body of private rights is created and controlled by Congress, and not by a legislature of the District. But for the Territory of Hawaii, it is enough to refer to the Organic Act. *Kawananakoa*, 205 US at 353-354.

But this is no longer the case. *See*, District of Columbia Self Government and Governmental Reorganization Act, PL 93-198; 87 Stat. 774; 1 *US Code Congressional and Administrative News*, 93rd Congress, 1st Session 847 (1970). In that Act, it was the intention of Congress to "grant to the inhabitants of the District of Columbia powers of local self government." 1 *US Congressional and Administrative News*, 93rd Congress, 1st Session (1970) at 850. This Court drew further distinctions between Territories and the District of Columbia in *District of Columbia v. Carter*, 409 US 418 (1973). The issue in that case was whether acts under the color of law of "any State or Territory" included acts under the color of law of the District of Columbia. The Court held it did not, essentially because Congress could exert direct control over the District of Columbia and its officers. *District of Columbia v. Carter*, 409 US at 429. However, acts under color of law of the District of Columbia have been added to Section 1983. It is therefore useful to note that the District of Columbia is liable for its deprivations of Civil Rights

under Section 1983. *Carter v. District of Columbia*, 795 F.2d 116 (D.C. Cir. 1986). *See* also *Norris v. District of Columbia*, 614 F.Supp. 294 (D.C. 1985) affirmed 787 F.2d 675; *Dougherty v. Barry*, 604 F.Supp. 1424 (D.C. Cir. 1985).

The Commonwealth of Puerto Rico however has been held to be immune from actions under Section 1983 by the Eleventh Amendment. *Ezratty v. The Commonwealth of Puerto Rico*, 648 F.2d 770 (1st Cir. 1981).

> The principles of the Eleventh Amendment, which protect a State from suit without its consent, are fully applicable to the Commonwealth of Puerto Rico. *Ezratty*, 648 F.2d at 776, n.7.

In no cases on which the *Ezratty* Court relies is there a reasoned discussion of the applicability of the Eleventh Amendment. It relies on, for example, *Ursulich v. Puerto Rico National Guard*, 384 F.Supp. 736 (D.C. P.R. 1974), which involved a claim arising under the laws of Puerto Rico, not Federal law, and justified the dismissal of the suit on the grounds of common-law sovereign immunity and the Eleventh Amendment. The fact that Puerto Rico has obtained some measure of sovereignty through its Commonwealth status cannot justify the application of the Eleventh Amendment to it, especially since the plain language of the Eleventh Amendment applies only to States. But in any event, the Eleventh Amendment does not apply to Guam and these cases therefore are distinguished.

Finally, the Ninth Circuit's decision in this case is unsound in its reasoning. The Ninth Circuit correctly states that the question put to it in *Monell* is "whether 'there is . . . justification for excluding (the entity) from the 'persons' covered by (Section 1983)." 436 US at 701. *Ngiraingas v. Sanchez*, Petition for Writ of Certiorari, Appendix pp.39-40, 858 F.2d at 1370. Noting that Guam

enjoys only such powers as may be delegated to it by Congress in the Organic Act, *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1286 (9th Cir. 1985), cert. den. 475 US 1081 (1986), the Court holds that Guam is an instrumentality of the federal government. *id*. It then draws the analogy that Guam is much like a federal department or administrative agency but admits that the analogy is "counter-intuitive."

> After all, Guam elects governmental officials, its citizens participate politically and the territory enjoys many of the trappings of a sovereign governmental entity. *See* 48 USC Section 1421-1428(e). But there are also very significant differences, differences we deem conclusive for purposes of the question presented to us. Guam marches squarely to the beat of the federal drummer; the federal government bestows on Guam its powers and, unlike the states, which retain their sovereignty by virtue of the Constitution, Guam's sovereignty is entirely a creation of federal statute. *Ngiraingas v. Sanchez*, Petition for Writ of Certiorari, Appendix p.40, 858 F.2d at 1371.

In the Organic Act, the United States granted Guam self-governing powers. 42 USC 1421(a). The legislative history of the Organic Act makes clear Congress's intention.

> The Organic Act establishes democratic local government for the island, and guarantees human freedoms under the authority of Congress rather than the executive branch. American citizenship would be conferred on the approximately 27,000 native Guamanians who gave such valiant proof of their loyalty to the United States and American traditions in two world wars, including four years of enemy occupation by the Japanese armed forces. A Bill of

> Rights is provided; a representative local government formed in the American tradition; an independent judiciary created, administering a system of law based on local needs and local traditions, all within the American framework of fundamental fairness and equality; and the scope of executive authority is defined and limited. 2 *USC Congressional Service*, 81st Congress, 2d Session at 2841 (1950).

The Ninth Circuit also concludes that "as a creature of the Federal government, Guam stands in sharp contrast to 'bodies politic' as that phrase is normally understood." *Ngiraingas v. Sanchez*, Petition for Writ of Certiorari, Appendix p.41, 858 F.2d at 1371.

If this is true, then what meaning does self government have? Congress provided some measure of sovereignty and self government to the Territory of Guam. But the fact that it retained plenary authority, and may remove these privileges and liberties at its discretion, does not make them any less meaningful while they exist.

> It is settled that Congress has sovereignty over the territories of the United States and accordingly has power to legislate for a territory with respect to all subjects upon which the legislature of the state might legislate within the state. (Citation). It is also settled that Congress may delegate to a territory such of these powers as it sees fit. (Citation). And the right of Congress to revise, alter and revoke these delegated powers does not diminish the powers while they reside in the territory. The aim of Congress is to establish democratic local government and self determination. The local laws enacted under the legislative power granted by Congress are accordingly territorial laws enacted by a Territorial sovereign, not laws of the United States. (Citation).
>
> These principles apply to the unincorporated Territories, such as the Virgin Islands. For it has

> been held that Congress may create a territorial government for an unincorporated territory and may confer upon it an autonomy similar to that of the states. *Gromer v. Standard Dredging Company*, 224 US 362 (1912) (additional citation). And the territorial body politic thus created may be endowed with attributes of sovereignty, such as non-liability to suit without its consent. *Harris v. Boreham*, 233 F.2d at 113-114.

The Ninth Circuit also relies below on its ruling in *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285 (9th Cir. 1985), that Guam is immune from Federal anti-trust legislation, and the loose language of *Sakamoto* that "there is no reason why Guam should enjoy less immunity than the federal government itself." 764 F.2d at 1289. But this conclusion is without reason. States are immune because of their place in the Federalist system. They are the most sovereign of entities which comprise the Union other than the United States itself. But Guam, which is under the direct plenary authority of Congress, has no independent sovereignty by its nature, unless conferred by Congress. Where is the "logical and practical," *Kawananakoa v. Polyblank*, 205 US 349, 353 (1907), source of immunity? States are immune because they have sovereignty, Guam is immune because it has none. Congress permitted the Territory of Guam to govern itself, and placed on it the responsibilities of maintaining a Bill of Rights, and specifically extended the Due Process and Equal Protection guarantees under the U.S. Constitution to Guam. If the Territory violates these responsibilities, it should be responsible for it. Otherwise, the Congressional intent of self determination is defeated. Establishing democracy is a process, not without pain and not without setbacks. To

deny the people of Guam this remedy against their government will promote future deprivations of the kind which are the subject of this action.

The Ninth Circuit below distinguished *Fleming* in footnote 1, Petition for Writ of Certiorari, pp.A41-42, 858 F.2d 1368, which states as follows:

> Guam's relationship with the United States government distinguishes this case from *Fleming v. Department of Public Safety*, Amended Slip Op. 4445, (9th Cir. April 8, 1988), where we held that the Commonwealth of the Northern Marianas Islands (CNMI) is a person for the purposes of Section 1983. *id.* at p.4455. CNMI has a unique relationship with the United States; the original Trusteeship Agreement obligated the United States to 'promote the development of the inhabitants of the Trust Territory toward self government or independence;' (*See* Trusteeship Agreement for the former Japanese Mandated Islands, July 18, 1947, Article VI, Section 1, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189, quoted in *Fleming*, Amended Slip Op. at 4449). Significantly, 'the United States does not possess sovereignty over the Trust Territory' but merely 'excrcises powers of administration, legislation, and jurisdiction . . . pursuant to an agreement with the United Nations.' *United States v. Covington*, 783 F.2d 1042, 1055 (9th Cir. 1985), cert. den. 107 S.Ct. 117 (1986); *Commonwealth of Northern Mariana Islands v. Atalig*, 723 F.2d 682, 684 (9th Cir.) cert. den. 467 US 1244 (1984). Guam's relation to the United States is entirely different. Guam has no separate sovereign status; unlike CNMI, it 'is subject to the plenary power of Congress and has no inherent right to govern itself.' *Atalig*, 723 F.2d at 687; *See* also *Leibowitz*, 16 Va. Journal of International Law at 62-63 ('authority of the Guam government depends entirely upon the will of Congress, and it is at all times subject to such alterations as

> Congress may see fit to adopt'); *cf. Barusch v. Calvo*, 685 F.2d 1199, 1202 (9th Cir. 1982) (distinguishing CNMI from Guam with respect to border searches).
>
> *Fleming* does not state that Guam is a person or that *Bunyan v. Camacho*, 770 F.2d 773 (9th Cir. 1985) cert. den. 477 US 903 (1986), stands for that proposition. It says only that Section 1983 is applicable in Guam, as well as in the several states. *See* Amended Slip Op. at 4452 n.2. In its later discussion holding the CNMI is a person, Guam is not mentioned.

These distinctions are unpersuasive. First, *Fleming v. Department of Public Safety, supra*, was decided after the Trusteeship Agreement with respect to the Northern Marianas was terminated, and the Covenant Making the Northern Marianas a Commonwealth of the United States was implemented. (*See* PL94-241, March 24, 1976, as amended by PL98-213, Section 9, December 8, 1983, 97 Stat. 1461; PL99-396, Section 10, August 27, 1986, 100 Stat. 840. Reprinted in note to 48 USC 1681). And, according to the legislative history of Guam's Organic Act, the "Responsibility of Congress" to Guam is similar:

> In addition to the obligations under the Treaty of Paris, the United States has additional treaty obligations with respect to Guam as a non-self governing territory. Under Chapter XI of the Charter of the United Nations, ratified by the Senate, June 26, 1945 (59 Stat. at p.1048), we undertook, with respect to the peoples of such territories, to ensure political advancement, to develop self government, and taking 'due account of the political aspirations of the peoples, . . . to assist them in progressive development of their free political institutions . . . ' 2 *USC Congressional Service*, 81st Congress, 2d Session, (1950) at 2841.

There is no significant difference in the responsibilities of the United States under the Trusteeship Agreement for the Former Japanese Mandated Islands, and in the Charter of the United Nations, since Guam is a non-self governing Territory. Congress has limited its plenary authority to the purposes stated in its acceptance of the United Nations Charter. Therefore, the Opinion of the United States Court of Appeals for the Ninth Circuit in this case is unpersuasive and in fact relies upon extraneous issues which do not explore the nature of Section 1983, the Eleventh Amendment or the Organic Act. No matter what Guam or CNMI may once have been, they are now defined by the Organic Act and the Covenant, respectively.

In conclusion for this section, given the broad scope of Section 1983, and its remedial purpose, Guam is a person liable for deprivations of Civil Rights since there is nothing in the legislative history that requires it to be excluded. Additionally, although certainly not the focus of the debates concerning the Civil Rights Act of 1871, future Territories and acquisitions were not entirely ignored and that provides at least some justification in legislative history for their inclusion within Section 1983. The unincorporated Territory of the Virgin Islands has been held to be liable under Section 1983, as has the District of Columbia and the Commonwealth of the Northern Marianas Islands. These entities are not States, nor are they municipalities. The only entity which is held immune from Section 1983 is Puerto Rico, on the basis of the Eleventh Amendment, which by its plain language is inapplicable to Territories or Commonwealths. For these reasons, it is respectfully submitted that the Territory of Guam is a person intended by the Congress to be liable

for its violations of Civil Rights under 42 USC 1983. We now turn to the question of whether there is a basis for immunity which would otherwise preclude liability against the Territory.

(B)

THE TERRITORY OF GUAM HAS NO SOVEREIGN IMMUNITY FROM AN ACTION UNDER 42 USC SECTION 1983

"Any immunity afforded to persons acting under color of State law which is wrongful under 42 USC 1983 cannot be immunized by State law, and any claim of immunity raises a question of Federal law." *Martinez v. State of California*, 444 US 277, 284, n.8 (1980). There are two possible sources of sovereign immunity afforded the Territory of Guam, common-law or the Organic Act. It is the position of the Petitioners that whichever source gives rise to sovereign immunity for the Territory of Guam, it is insufficient to protect the Territory against an action brought under 42 USC 1983.

The first source of immunity is the common-law. This Court noted in *Kawananakoa v. Polyblank*, 205 US 349 (1907), that the Territory of Hawaii had sovereign immunity:

> Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes, *Leviathan*, Chapter 26, 2. The sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends . . .

> As the ground is thus logical and practical, the doctrine is not confined to powers that are sovereign in the full sense of juridicial theory, but naturally is extended to those, in actual administration, originate and change at their will the law of contract and property, from which the persons within the jurisdiction derive their rights. A suit presupposes the defendants are subject to the law invoked. Of course it cannot be maintained unless they are so. But that is not the case with a territory of the United States, because the territory itself is the fountain from which rights ordinarily flow. It is true that Congress might intervene, just as, in the case of the state, the Constitution does, and the power that can alter the Constitution might. But the rights that exist are not created by Congress or the Constitution, except to the extent of certain limitations of power. *Kawananakoa v. Polyblank*, 205 US 353-354.

See also *People of Puerto Rico v. Rosaly*, 227 US 270 (1913).

It is apparent from this language that the Court only intended to immunize the Territory of Hawaii from suits brought pursuant to law enacted by the Territory. This case arises under a Federal statute and therefore this common-law immunity would not be sufficient to provide protection to the Territory. In discussing this same passage, and noting that the immunity is based "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends," this Court noted:

> This explanation adequately supports the conclusion that no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts. *Nevada v. Hall*, 440 US 410, 415 (1979).

Since the District Court of Guam is a Federal court "established by Congress", 48 USC 1424(a), and not a "local court" established by the legislature of the Territory, 48 USC 1424-1, the Territory was not sued in its "own court," or under Territorial law, and therefore this immunity is inapplicable to this action.

As noted above, the Eleventh Amendment was not applied to Guam in the Organic Act. The Ninth Circuit in *Fleming v. Department of Public Safety*, 839 F.2d 401 (9th Cir. 1989) stated with reference to the Commonwealth of the Northern Marianas Islands:

> The omission of the Eleventh Amendment thus clearly signals a waiver of any common-law sovereign immunity against Federal suits; there is simply no meaningful distinction between Eleventh Amendment immunity and common-law sovereign immunity insofar as Federal suits are concerned. *Fleming v. Department of Public Safety*, 837 F.2d at 407.

The second source of immunity is the Organic Act. 48 USC 1421(a) states in relevant part:

> Guam is declared to be an unincorporated territory of the United States and the capital and seat of government thereof shall be located at the City of Agana, Guam. The Government of Guam shall have the powers set forth in this chapter, shall have power to sue by such name, and, with the consent of the legislature evidenced by enacted law, may be sued upon any contract entered into with respect to, or any tort committed incident to, the exercise by the Government of Guam of any of its lawful powers . . .

Congress amended this section of the Organic Act in 1959 "to authorize suits against the Government of Guam, with the consent of the legislature." Senate Report Number 969, September 8, 1959, PL 86-316, 73 Stat. 588, 2

U.S. Code Congressional and Administrative News, 86th Congress, 1st Session (1959) at 2659. That legislative history indicates that an additional purpose of the act was to "bring the Guam Organic Act more closely into line with the Virgin Islands' Organic Act which permits suits to be brought against the Government of that unincorporated Territory on contracts, and with permission of the legislature, in tort." *id*. at 2660. The legislative history states that the source of immunity is the Organic Act:

> As originally enacted, Section 3 of the Guam Organic Act merely provides that 'the Government of Guam *** shall have power to sue by such name.' The proposed amendment, if revised as has been suggested above, would add the words 'and, with the consent of the legislature evidenced by enacted law, may be sued.' This, in effect, enables the legislature of Guam to waive the sovereign immunity which was conferred upon the Government of Guam by the Congress through enactment of the Guam Organic Act when, in the legislature's opinion, the best interests of both the people and Government of Guam would be served by allowing such action to be brought. Letter from the Department of the Interior, Office of the Secretary to Honorable Wayne N. Aspinall, March 9, 1959, *id*. at 2660.

In contrast to this statutory immunity, the Organic Act also demonstrates Congress's intention to secure liberties to the people of Guam. As noted above, a complete Bill of Rights is afforded, and both the Fifth Amendment, which includes the Due Process clause, and the second sentence of Section 1 of the Fourteenth Amendment, which includes the Equal Protection clause, are extended to Guam. Section 1983 was passed pursuant to the Fourteenth Amendment's Enabling clause and in fact was designed "to enforce the provisions of the Fourteenth

Amendment . . . " *Monell v. City of New York, Department of Social Services*, 436 US at 664, (quoting Representative Shellabarger acting for a house select committee reporting on HR 326). The connection is apparent. Congress would not afford the Constitutional protection without a means to enforce it against all persons. Any immunity conferred by Congress in the Organic Act, or by the common-law, is stripped by these provisions. Indeed, this is the reasoning of the Third Circuit in *Ocasio v. Bryan*, 374 F.2d 11 (3rd Cir. 1967), decided prior to *Monell*.

> It is difficult to believe that in adopting what in effect is the Constitution of the Virgin Islands, the same Congress which provided a Bill of Rights taken from the Constitution of the United States would have intended at the same time silently to work the repeal of the Civil Rights Act of 1871. Far from indicating any such intention, Section 2(b) plainly harmonizes with the right to enforce the Civil Rights Act of 1871 in the Territory of the Virgin Islands. *Ocasio v. Bryan*, 374 F.2d at 13-14.

By extension of this reasoning, and after this Court's decision in *Monell*, the Third Circuit held in *Frett v. Government of Virgin Islands, supra*, 839 F.2d 968 (3rd Cir. 1988), that the Territory of the Virgin Islands was a person subject to liability under Section 1983, and that "(a)ttributing to the 1954 Congress, which passed the Organic Act, an intention to confer on the Government of the Virgin Islands an immunity from tort actions based on the Constitution and laws of the United States greater than that enjoyed by the States and their subdivisions would be inconsistent with Section 1983 purposes." *Frett v. Government of Virgin Islands*, 839 F.2d at 977. Indeed, this Court has found with respect to Puerto Rico that

similar language in the Organic Act of Puerto Rico, sometimes known as the Jones Act, 39 Stat. 951, which was in effect until 1952, was selected "with the Fourteenth Amendment in mind and with a view to further development by this Court of the doctrines embodied in it." *Examining Board of Engineers Architects and Surveyors v. Flores de Otero*, 426 US at 591-592.

The Court noted in *Will v. Michigan Department of State Police*, ___ US ___, 109 S.Ct. 2304 (1989), that in enacting Section 1983, Congress did not intend "to override well established immunities or defenses under the common-law." 109 S.Ct. at 2309. Section 1983 was not intended to disregard the "well established immunity of a State from being sued without its consent." 109 S.Ct. at 2310. First, the Territory is not being sued in a Territorial court under Territorial law and that is the only "well established" immunity for Territories. Second, footnote 7, may indeed hold the key which unlocks this issue. It states in full:

> Our recognition in *Monell v. New York City Department of Social Services*, 436 US 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), that a municipality is a person under Section 1983, is fully consistent with this reasoning. In *Owen v. City of Independence*, 445 US 622, 100 S.Ct. 1398, 13 L.Ed.2d 673 (1980), we noted that by the time of the enactment of Section 1983, municipalities no longer retained the sovereign immunity they had previously shared with the States. '(B)y the end of the Nineteenth Century, courts regularly held that in imposing a specific duty on the municipality either in its charter or by statute, the State has impliedly withdrawn the city's immunity from liability for the non-performance or misperformance of its obligation,' *id.* at 646, 100 S.Ct. at 1413, and as a result, municipalities had been held liable for damages 'in a multitude

> of cases' involving previously immune activities, *id.* at 646-647, 100 S.Ct. at 1413.

Congress may legislate for a Territory as a State can for municipal organizations. *First National Bank of Brunswick Maine v. County of Yankton*, 101 US 130 (1880). By imposing the obligation upon the Territory to respect the rights and liberties of the residents, by way of the Bill of Rights and the direct application of the Fifth Amendment and the Equal Protection clause of the Fourteenth Amendment, Congress imposed "a specific duty on the (Territory) . . . by statute (and) . . . impliedly (withdrew) the (Territory's) immunity from liability for the non-performance or misperformance of its obligation." *Will*, 109 S.Ct. at 2310, n.7.

Additionally, the legislative history of Guam's Organic Act recognizes the "unenlightened" distinction, *Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare State of Missouri*, 411 US 279, 296, n.11 (1973), (Marshall J. concurring) between a government's proprietary functions and its governmental or sovereign functions. 2 *USC Congressional and Administrative News*, 86th Congress, 1st Session, at 2659. It is therefore useful at this point to examine *Owen v. City of Independence*, 445 US 622 (1980).

In *Owen*, the Court determined that governmental entities do not share the "good faith" immunity of its officials, *see* e.g. *Procunier v. Navarett*, 434 US 55 (1978), nor do they have any other type of sovereign immunity. First, the Court noted that "by its terms, Section 1983 'creates a species of tort liability that on its face admits of no immunities.' *Imbler v. Pachtman*, 424 US 409, 417, 47 L.Ed.2d 128, 96 S.Ct. 984 (1976)." *Owen v. City of Independence*, 445 US at 635. The Court reiterated the intention of

Congress to give Section 1983 an expansive and broad sweep.

But the Court did note that there existed traditions of immunity which were "so firmly rooted in the common-law and were supported by such strong policy reasons," that Congress would have specifically provided if it had wished to abolish the doctrine. *Owen v. City of Independence*, 445 US at 637. The Court cites *Tenney v. Brandhove*, 341 US 367 (1951) to note that Section 1983 did not override the tradition of legislative immunity which was "so well grounded in history and reason." *Owen*, 445 US at 637. Whenever the Court found an immunity to a Section 1983 action it "was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common-law and the interests behind it. *Imbler v. Pachtman*, 424 US at 421." *Owen v. City of Independence*, 445 US at 638.

As noted above, there is no well grounded tradition of Territorial immunity to Federal actions in Federal courts. This Court cited various Territorial cases in its Opinion in *Kawananakoa*, but each of those were causes which arose under Territorial law and were brought in Territorial courts. Additionally, by the plain language of *Kawananakoa*, the "logical and practical" basis of Territorial sovereign immunity rests on the concept that it is the enacting sovereign which is immune from its own laws, not laws passed by its plenary sovereign, i.e. Congress. Moreover, the Court notes that the immunities which it had found so well grounded in history and common-law, were immunities provided to individual officials and not the governmental entities.

> The governmental immunity at issue in the present case differs significantly from the official immunities involved in our previous decisions.

> In those cases, various government officers had been sued in their individual capacities, and the immunity served to insulate them from personal liability for damages. Here, in contrast, only the liability of the municipality itself is at issue, and not that of the officers, and in the absence of an immunity, any recovery would come from public funds. *Owen v. City of Independence*, 445 US at 638, n.18.

It should be observed at this point that this Court has never held any governmental entity to be immune from an action pursuant to Section 1983, except States under the Eleventh Amendment. States are not subject to liability under Section 1983 because they are not "persons." *Will v. Michigan Department of State Police*, ___ US ___, 109 S.Ct. 2304 (1989).

The Court in *Owen* also considers whether either of the two traditional measures of immunity from tort liability, i.e. "governmental" versus "proprietary" functions and "discretionary" versus "ministerial" functions would provide any protection. Since the legislative history of the Organic Act explicitly recognizes the distinction between proprietary and governmental functions, the discussion in *Owen* is instructive with respect to its applicability. Traditionally, when a municipality engaged in its proprietary functions, as opposed to its governmental functions, there is no immunity, but when a State imposed a specific duty on a municipality within its governmental functions, immunity was impliedly withdrawn.

> The critical issue is whether injury occurred while the city was exercising governmental, as opposed to proprietary, powers or obligations – not whether its agents reasonably believed they were acting lawfully in so conducting themselves. More fundamentally, however, the

> municipality's 'governmental' immunity is obviously abrogated by the sovereign's enactment of a statute making it amenable to suit. Section 1983 was just such a statute. By including municipalities within the class of persons subject to liability for violations of the Federal Constitution and laws, Congress – the supreme sovereign on matters of Federal law – abolished whatever vestige of the State's sovereign immunity the municipality possessed. *Owen*, 445 US at 647.

The analogy to Guam is not difficult to perceive. Section 1983 which was designed to enforce the Fourteenth Amendment, which is specifically applied to Guam in the Organic Act, also abrogates any sovereign immunity which may have existed by virtue of the common-law. It is unlikely that Congress intended the immunity provisions of the Organic Act to override the liberties it affords. If Guam is a person for the purpose of Section 1983, there can be no immunity protecting Guam.

With respect to "discretionary" immunity, the Court stated:

> The common-law doctrine merely prevented Courts from substituting their own judgment on matters within the lawful discretion of the municipality. But a municipality has no 'discretion' to violate the Federal Constitution; its dictates are absolute and imperative. *Owen v. City of Independence*, 445 US at 649.

This conclusion is even more compelling when considered in the context of a Territory. The only discretion that resides in Guam is that conferred by Congress under its plenary authority. Congress would not leave within Guam the discretion to violate Constitutional rights. Moreover, since Congress directly applied the Fifth Amendment and the second sentence of Section 1 of the Fourteenth Amendment to Guam, and provided that they

"shall have the same force and effect (in Guam) as in the United States or in any State of the United States," 48 USC 1421(b)(u), Congress has made clear there is no such discretion.

Section (b) of *Owen* discusses the policy purpose for declining to provide a qualified or other immunity to governmental entities, and these policies are no less applicable to a Territory, especially in view of the fact that acts taken under color of Territorial law are explicitly included within Section 1983.

> Our rejection of a construction of Section 1983 that would accord municipalities a qualified immunity for their good faith Constitutional violations is compelled both by the legislative purpose in enacting the statute and by considerations of public policy. The essential aim of the Civil Rights Act was to provide protection to those persons wronged by the 'misuse of power, possessed by virtue of State law and made possible only because the wrongdoer is clothed with authority of State law.' (Citation). By creating an express Federal remedy, Congress sought to 'enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it. (Citation).
>
> How 'uniquely amiss' it would be, therefore, if the government itself – 'the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct' – were permitted to disavow liability for the injury it has begotten. (Citation). A damage's remedy against the offending party is a vital component of any scheme for vindicating cherished Constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution

> that has been established to protect the very rights it has transgressed. Yet owing to the qualified immunity enjoyed by most governmental officials, *see, Scheuer v. Rhodes,* 416 US 232, 40 L.Ed.2d 90, 94 S.Ct. 1683, 71 Ohio Ops. 2d 474 (1974), many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good faith defense. Unless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated. *Owen v. City of Independence,* 445 US at 651.

There are no countervailing considerations which apply to Guam. There is no Constitutional consideration, nor is there a consideration arising under any concept of Federalism. Nor is it logical to infer that Congress intended Guam to remain immune when it is under its plenary authority, and the act giving rise to liability is Federal. Again, the Court should consider the anomaly of a result where States are not liable under Section 1983 because of the special respect given to their sovereignty, and Territories are not liable under Section 1983 because they have no sovereignty.

> Moreover, Section 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future Constitutional deprivations as well. (Citation). The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended action to err on the side of protecting citizens' Constitutional rights. *Owen v. City of Independence,* 445 US at 651-652.

Guam is far from the mainland. Democratic institutions are developing and insecure. The Territory of Guam was ceded to the United States in 1898 as the spoils of the

Spanish-American War. It was recaptured from the Japanese after World War II and granted the status of an unincorporated Territory, with the sovereignty to decide issues of local importance. The philosophical and democratic contradictions in this situation cannot be ignored. Unlike those of the States, or the Commonwealths, the residents of the Territories have not voted to become part of the United States and are considered by some to be maintained in a colonial status. The Territorial government has virtually complete control over the lives of the residents of the Territory. It collects taxes, issues business licenses, maintains the only hospital, provides electricity, provides water, maintains the only police force and fire department, licenses automobiles and provides the only local telephone service. These functions, in other places in the United States, are often distributed throughout different political entities, or in some instances managed by private concerns. To be virtually remediless against such an overwhelming authority is not a status in which liberty thrives. Indeed, it was these very dangers which led to the creation of the Federal system. Policy strongly recommends an interpretation consistent with Section 1983 liability.

But there are contrary views. For example, as pointed out above, Puerto Rico is considered by the First Circuit to be protected by the Eleventh Amendment. Indeed, it has even been deemed to be immune from Constitutional claims. "Nor is the principle of governmental immunity inapplicable merely because plaintiff is making a Constitutional claim. *See, Parden v. Terminal Railroad Company,* 1964, 377 US 184, 186, 84 S.Ct. 1207, 12 L.Ed.2d 233." *Cortes v. Commonwealth of Puerto Rico,* 422 F.2d 1308 (1st Cir. 1970). However, *Parden v. Terminal Railroad Company*

is not a solid foundation upon which to base this conclusion since in that case, the Court decided only that Congress, in enacting the Federal Employers Liability Act had intended to override the States' Eleventh Amendment immunity on the basis of the Commerce power, and "Puerto Rico is not a State." *Examining Board of Engineers Architects and Surveyors v. Flores de Otero,* 426 US 572, 607 (1976) (dissent Rehnquist, J.). Puerto Rico has, additionally, adopted the distinctions of *Ex Parte Young,* 209 US 123 (1908), and has generally held its immunity to be consistent with the rules derived from the Eleventh Amendment. *See, Camunas v. New York and PRSS Company,* 260 F. 40 (1st Cir. 1919); *Penagaricano v. Allen Corporation,* 267 F.2d 550 (1st Cir. 1959). However, Puerto Rico's immunity does have limits. *See* e.g. *Alcoa Steamship Company v. Perez,* 424 F.2d 433 (1st Cir. 1970). And Puerto Rico's sovereign immunity may be waived by entering into litigation. *Veitia v. Fortuna Estates,* 240 F. 256 (1st Cir. 1917); *Richardson v. Fajardo Sugar Company,* 241 US 44 (1916).

In any event, the decisions regarding the sovereign immunity of Puerto Rico provide little guidance. It is submitted that these decisions are unsound, and by their terms do not rely upon common-law sovereign immunity or a statutory immunity similar to that of Guam, but instead upon the Eleventh Amendment.

There are also troubling precedents in the Ninth Circuit regarding Guam. In *Sakamoto v. Duty Free Shoppers, Ltd.,* 764 F.2d 1285 (9th Cir. 1985), the Ninth Circuit held that the negative implications of the Commerce Clause are inapplicable to Guam because the Government of Guam is "not a state." *Sakamoto,* 764 F.2d at 1286. Additionally, the Ninth Circuit determined that Guam is

immune from Federal anti-trust liability because Guam "is an instrumentality of the Federal government over which the Federal government exercises plenary control." *Sakamoto*, 764 F.2d at 1289. Consequently, "(t)here is no reason why Guam should enjoy less immunity than the Federal government itself." *id*.

Sakamoto's holding is confined to anti-trust liability only. On the other hand, the rights of Due Process and Equal Protection are explicitly applied in the Organic Act and legislation such as Section 1983 which is specifically designed to enforce these rights should be applicable.

Additionally, the proper construction of *Sakamoto*'s language should not imply that Federal sovereign immunity is in any way applicable to the Territory of Guam. *See, Harris v. Boreham*, 233 F.2d 110 (3rd Cir. 1956), in which this issue was directly addressed in the context of the unincorporated Territory of the Virgin Islands. There is nothing in the Organic Act directly conferring Federal immunity on the Territory. Further, the common-law source of immunity noted by this Court in *Kawananakoa v. Polyblank, supra*, in no way implied that the source of Territorial immunity is the sovereign immunity of the United States. In fact, the Court relies on the existence of independent sovereignty acquired through its Organic Act in holding the Territory of Hawaii immune.

Crain v. Government of Guam, 195 F.2d 414 (9th Cir. 1952), held that Guam has sovereign immunity under the Organic Act as it existed prior to the 1959 amendment. The Ninth Circuit relied upon *Kawananakoa v. Polyblank, supra*, in reaching that conclusion. *Crain* was a declaratory relief action against the Government of Guam to restrain it from collecting the Territorial income tax. 48 USC 1421(i). These provisions have been known as the

mirror image tax code. *Holmes v. Director of Revenue and Taxation*, 827 F.2d 1243 (9th Cir. 1985). They provide that the Internal Revenue Code shall be applicable to Guam, but "Guam" shall be substituted for "United States" and "Governor or his delegate" for "Secretary or his delegate." *See* 42 USC 1421(i)(e). It is therefore considered to be the Territorial income tax, and is fully enforceable by the Government of Guam. *Crain* is an unwarranted extension of *Kawananakoa*, if it is interpreted to hold that it barred suit against the Territory on an action brought under Federal law.

Such an interpretation reflects the unreasoned expansion that lower courts have given the immunity set forth in *Kawananakoa*. *See, Marx v. Guam*, ___ F.2d ___ (Case #87-2713 (9th Cir.) January 24, 1989). Guam is evidently sovereign enough by virtue of the powers vested in it by the Organic Act to have sovereign immunity, as was the Territory of Hawaii in *Kawananakoa*. However, to interpret this immunity as protecting Guam from a Federal action, especially when the very provisions of the Constitution designed to be enforced by that action are applied to Guam, is a misinterpretation of the nature of the immunity, and it loses its "logical and practical" *Kawananakoa*, 205 US at 527, foundations when Courts stray beyond claims arising under Territorial law.

In conclusion, there is no basis in tradition or statute for an immunity which would provide Guam with protection against an action under Section 1983. Congress has deemed fit to directly apply Equal Protection and Due Process to the people of the Territory, and a ruling which provides immunity against those protections would be contrary to Congressional intent.

II

IMMUNITY OF OFFICERS ACTING IN THEIR OFFICIAL CAPACITIES

The Petitioners concede that if the Territory of Guam is not liable under Section 1983, then the Government officers acting in their official capacity would enjoy the same immunity. *Will v. Michigan Department of State Police*, ___ US ___, 109 S.Ct. 2304, 2311 (1989). However, in their individual capacities, they would enjoy only the good faith immunity which is set forth in Section 2 of the United States Court of Appeals' Opinion below. These conclusions were not challenged below.

CONCLUSION

Petitioners request that this Court reverse the Amended Opinion and Order of the United States Court of Appeals for the Ninth Circuit and hold that the Territory of Guam is a person for 42 USC 1983 purposes, and has no immunity from such an action, and remand to the District Court of Guam for further proceedings consistent with the Opinion.

Respectfully submitted,

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BRIEF

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CLERK

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...1989

...AR ONGKLUNGEL, JIMMY
...EL, JONAS NEGEHEED and

Petitioners,

vs.

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Respondents.

... To The
... Appeals

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QUESTION PRESENTED

Whether the Government of Guam or its officials, acting in their official capacities, are subject to suit under 42 U.S.C. §1983?

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STATUTES INVOLVED

Section 1 of the Civil Rights Act of 1871, c. 22, 17 Stat. 13 (1871) (current version 42 U.S.C. §1983):

That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceedings for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled An Act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication, and the other remedial laws of the United States which are in their nature applicable in such cases . . . .

Section 1 of the Dictionary Act as amended in 1874. Rev. Stat. §1 (1874) (current version 1 U.S.C. §1 (1951)):

In determining the meaning of the revised statutes, or of any act or resolution of Congress passed subsequent to February twenty-fifth, eighteen hundred and seventy-one, words importing the singular number may extend and be applied to several persons or things; words importing the plural number may include the singular; words

importing the masculine gender may be applied to females; the words "insane person" and "lunatic" shall include every idiot, non compos, lunatic and insane person; the word "person" may extend and be applied to partnerships and corporations, and the reference to any officer shall include any person authorized by law to perform the duties of such office, unless the context shows that such words were intended to be used in a more limited sense; and a requirement of an "oath" shall be deemed complied with by making affirmation in judicial form.

Section 3 of the Organic Act of Guam. 48 U.S.C. §1421a:

Guam is declared to be an unincorporated territory of the United States and the capital and seat of government thereof shall be located at the city of Agana, Guam. The government of Guam shall have the powers set forth in this chapter shall have power to sue by such name, and, with the consent of the legislature evidenced by enacted law, may be sued upon any contract entered into with respect to, or any tort committed incident to, the exercise by the government of Guam of any of its lawful powers. The government of Guam shall consist of three branches, executive, legislative and judicial, and its relations with the Federal Government in all matters not the program responsibility of another Federal department or agency, shall be under the general administrative supervision of the Secretary of Interior.

Section 5(u) of the Organic Act of Guam. 48 U.S.C §1421b(u):

The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam to the extent that they have not been previously extended to that Territory and shall have the same force and effect there as in the United States or in any State of the United States: article I, section 9, clauses 2 and 3; article IV, section 1 and section 2, clause 1; the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and fifteenth and nineteenth amendments.

All laws enacted by Congress with respect to Guam and all laws enacted by the territorial legislature of Guam which are inconsistent with the provisions of this subsection are repealed to the extent of such inconsistency.

STATEMENT OF THE CASE

Petitioners brought an action, under 42 U.S.C. §1983, in the District Court of Guam against the Government of Guam, the Director of the Police Department in her official capacity, and six police officers in both their official and individual capacities. (J.A.3) Petitioners were arrested and transported to the narcotics office of the police department. (J.A.7) Petitioners allege that they were then harassed and assaulted by police officers in violation of their civil rights. (J.A.7-20) Petitioners ask for $50 million in compensatory damages, $50 million in punitive damages and attorney's fees. After dismissal of the action by the District Court (J.A.27), the United States Court of Appeals for the Ninth Circuit affirmed the dismissal as to all defendants except the police officers in

their individual capacities. The Court found that the Government of Guam and its officers, acting in their official capacities, are not subject to a suit for damages under 42 U.S.C. §1983. *Ngiraingas v. Sanchez*, 858 F.2d 1368 (9th Cir. 1988), reprinted in the Petition for Writ of Certiorari. This Court granted the Petitioners a Writ of Certiorari. Petitioners concede that if Guam is immune from liability under §1983, the officers, in their official capacities, have the same immunity. (Brief for Petitioners at 4).

SUMMARY OF ARGUMENT

1. At the time Territories were added, in 1874, to §1 of the Civil Rights Act of 1871, the statutory definition of "person" did not include Territories. The Dictionary Act was amended in 1874 at the same time Territories were added to the Civil Rights Act. The amended Dictionary Act substituted "partnerships and corporations" for "bodies politic and corporate" in the definition of "person". The stated purpose of the amendment was to exclude State, Territory and foreign governments from the definition of "person." Therefore, based on the statutory definition, Territories are not "persons" liable to suit under §1983.

2. Territories have always had a status and structure similar to States. There is no reason to expect that Congress would not extend to Territories the full immunity of a sovereign government, subject only to its plenary control.

3. A consolidated federal law in 1874, with provisions common to all Territory Organic Acts, provided that the laws of the United States were to have the same

"force and effect" in the Territories as elsewhere in the United States. The people in the Territories would, therefore, not have any greater rights against their government than the people residing in the States. This would preclude a right of action under §1983 against the Territory itself. The Organic Act of Guam has a similar provision which was enacted at the same time the Fourteenth Amendment was made specifically applicable to Guam.

4. During the Reconstruction-Era, there was a legal distinction between a municipal corporation and a quasi corporation. A quasi corporation was the legislative creation of a sovereign and paramount authority. It had the immunity of its creating sovereign as expressed in the law creating it. A municipal corporation was a voluntary association created pursuant to a charter or incorporation law for the purpose of self government. Municipal corporations were commonly sued, but quasi corporations, possessing the immunity of their creator, were not. Guam is of the nature of a quasi corporation. Therefore, although Congress made municipal corporations liable for §1983 violations, this does not mean that Congress also intended to make Territories liable.

5. Congress did not intend to override well established immunities when it enacted §1 of the 1871 Civil Rights Act. During the Reconstruction-Era, the immunity of Territories was well established. Because common law immunities were incorporated into §1 of the 1871 Civil Rights Act, suits against Guam in the District Court of Guam are prohibited.

6. Guam's Organic Act states the basis upon which Congress has waived sovereign immunity for suit and thereby determines whether Guam is a "person" within the meaning of §1983. In 1959 the Organic Act was

amended to allow suits against the government with the consent of Guam's Legislature as evidenced by enacted law. The purpose of the amendment was to allow the Legislature to best serve the interests of the people and the government in allowing suits. The Legislature has allowed suits in contract and for negligent torts. Guam's immunity waiver allows damages up to $100,000 for wrongful death and $300,000 for other negligence actions. Suits under §1983 would allow unlimited damages. This would violate the intent of Congress expressed in the Organic Act to allow the Legislature to balance the interest of private litigants with the public goals of government.

7. Congress did not "strip" away the Territory's immunity by extending basic civil rights to Guam as contended by Petitioners. The Bill of Rights provisions and the immunity provisions of the Organic Act are in harmony. Congress extended civil rights to Guam. In doing so it allowed suits against individuals who violate those rights, but Congress has not allowed suits against the Government itself.

8. Petitioners argue that by granting rights to the people of Guam, Congress was imposing a duty on the government to protect those rights and thereby impliedly waived Guam's sovereign immunity from §1983 actions. The granting of rights did not waive immunity. It allowed suits against individuals, not against the government. In addition Petitioners' argument would apply, if at all, to municipal corporations, not to Territories. Guam is not a municipal corporation.

ARGUMENT

1. TERRITORIES ARE NOT "PERSONS" UNDER THE DICTIONARY ACT.

Section 1 of the Civil Rights Act of 1871 provided a civil remedy against "any person who, under color of" law violated anothers civil rights. Act of Apr. 20, 1871, c. 22, §1, 17 Stat. 13 (1871) [hereinafter cited as §1 of the 1871 Act]. The Government of Guam did not come into existence until 1950.[1] Therefore the initial inquiry is whether Congress intended to include the then-existing Territories[2] within those "persons" to be held liable under §1 of the 1871 Act.

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[1] Guam became a possession of the United States by virtue of the Treaty of Paris at the end of the Spanish American War in 1898. Under the Treaty, Congress was to determine the civil rights and political status of the inhabitants of the island. 30 Stat. 1754. By the executive order of President McKinley, Guam was placed under the complete control of the Navy. 1950 Code Cong. & Ad. News 2856. Naval governors exercised all administrative and governmental authority over the island. Id. at 2840. Guam remained under federal military rule for 52 years (except during the Japanese occupation from December, 1941 to July, 1944). On August 1, 1950, The Organic Act of Guam established civil government on the island. 64 Stat. 384-93. Under the Organic Act, Guam was declared to be "an unincorporated territory of the United States." Act of August 1, 1950, c.512, §3. At the same time, by executive order of President Truman, "administrative responsibility" for Guam was transferred from the Secretary of the Navy to the Secretary of the Interior. 1950 U.S. Code Cong. & Ad. News 2858-59.

[2] Herein "Territory" refers to a Territorial government established by an Organic Act.

The 1871 Civil Rights Act was the first legislative remedy provided by Congress under section five of the Fourteenth Amendment. *Quern v. Jordan*, 440 U.S. 332, 354-55 (1979); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). "As originally enacted, §1 of the 1871 Act applied only to action under color of law of any 'State'." *District of Columbia v. Carter*, 409 U.S. 418, 424, n.11, *reh'g. denied*, 410 U.S. 959 (1973); *Examining Bd. of Eng. Arch. and Sur. v. Flores De Otero*, 426 U.S. 572, 582 (1976). The remedy had not yet been extended to Territories.[3] Since the 1871 enactment

[3] From the legislative debates over the 1871 Act, Petitioners cite one specific reference to Territories and one veiled reference. (Brief for Petitioners at 14) These references express the desire for a guarantee of constitutional rights in "every State and Territory of the Union" and "on the frontiers of [the nation's] extended domain". Id. The references are to the types of rights to be protected and the areas of protection. There is no assertion that Territorial governments are to be subject to liability. Congress was focusing on States, not Territories. In spite of the references pointed out by Petitioners, the 42nd Congress did not apply the Act to Territories. Since there was no cause of action under §1 of the 1871 Act in the Territories, Congress could not have intended to include Territorial governments within the meaning of "persons" when it passed the Act on April 20, 1871.

It is interesting to note that the precursor of the 1871 Act, the Civil Rights Act of 1866 (c.31, §2, 14 Stat. 27 (1866)) did apply in the Territories. This provision was enacted as a means to enforce the Thirteenth Amendment which provided that "[n]either slavery nor involuntary servitude . . . shall exist within the United States, *or any place subject to their jurisdiction*," (emphasis added) *District of Columbia v. Carter*, 409 U.S. at 421. Whereas §2 of the Civil Rights Act of 1866 enforced the Thirteenth Amendment which applied to every place subject to United States jurisdiction including Territories, the 1871 Act enforced the Fourteenth Amendment which applied just to States.

covered only actions taken under color of State law, Congress could not have intended Territories to be liable.

The phrase "or Territories" was added, without explanation, in the 1874 codification and revision of the United States statutes at large. Rev. Stat. §1979 (1874). *Carter*, 409 U.S. at 425, n.11; *Flores De Otero*, 426 U.S. at 582-583. The remedy then became applicable to actions in any "State or Territory." There is no indication that by adding "or Territory" in 1874, Congress intended that the range of "persons" liable under color of Territorial law should be any different than the range of "persons" liable under color of state law.[4]

An analysis of the meaning of the word "person" in §1 of the 1871 Act must begin with the Dictionary Act. *Monell v. Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658, 719 (1978) (Rehnquist, J., dissenting). The Dictionary Act provided that "the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context

[4] Since 1978 two attempts have been made to amend 42 U.S.C. §1983 to include States and Territories within the meaning of "person". The bills never left Committee. Sagafi-Nejad, *Proposed Amendments to Section 1983 Introduced in the Senate*, 27 St. Louis U.L.J. 373 (1983).

In *Will v. Michigan*, 109 S.Ct. 2304, 2308 (1989), this Court observed that including States within the meaning of "person" would be a rather awkward way to express that intent. This applies equally to Territories. It would be an unusual mode of expression to say "every person, [including a Territory] who, under color of any statutes . . . of any . . . Territory . . . subjects . . . "

shows that such words were to be used in a more limited sense . . . ."[5] c.71, §2, 16 Stat. 431 (1871) (current version, as amended 1 U.S.C. §1 (1951)). The Dictionary Act was amended in 1874.[6] The Act was amended in the same statutory revision which added Territories to §1 of the 1871 Civil Rights Act. The amended Dictionary Act substituted "partnerships and corporations" for "bodies politic and corporate" in the definition of "person". Rev. Stat. §1 (1874). Therefore when Territories were added to the 1871 Civil Rights Act, "person", as defined in the Dictionary Act, included "partnerships and corporations".

The Commission appointed to revise the United States statutes stated their reasons for the change:

> The reasons for the latter change [i.e substituting partnerships and corporations for bodies politic and corporate] are that partnerships ought to be included; and that if the phrase "bodies politic" is precisely equivalent to "corporation," it is redundant; but if, on the contrary, "body politic" is somewhat broader, and should be understood to include a government, such as a State, while "corporation" should be confined to an association of natural persons on whom government has conferred continuous succession, then the provision goes further than is convenient. It requires the draughtsman, in the majority of cases of employing the word "person," to take care that States, Territories, foreign governments, & *c*, appear to be excluded.
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> Revision of the United States Statutes as drafted by the Commissioners Appointed for That Purpose. In Two volumes. As Bound for Examination by the Committee of the House of Representatives of the Forty-Second Congress on the Revision of the Laws, p. 19 (1872).

[5] The Dictionary Act was introduced in the 41st Congress, 3rd Session to give guidance to a codification Commission authorized by the 39th Congress to revise and consolidate the statutes of the United States. The Commissioners were to "suggest to Congress such contradictions, omissions and imperfections" and "the mode in which they have reconciled, supplied, and amended the same." Act of June 27, 1866, c.140, §3, 14 Stat. 75 (1866).

[6] The language of the amended Dictionary Act made the definitions therein retroactive "to February 25, 1871." Rev. Stat. §1 (1874). Under this retroactive clause the new definition of "person" would predate the 1871 Civil Rights Act which was passed April 20, 1971. 42 U.S.C. §1983, Historical Note.

Thus the Committee felt that "in the majority of cases" "person" would not include States, Territories, foreign governments and the like. The purpose of the revision was to exclude these entities from the definition. Territories were, therefore, not "persons" as defined by the Dictionary Act.

2. TERRITORIES HAVE ALWAYS HAD A STATUS AND STRUCTURE SIMILAR TO STATES.

Territories have always had a status and structure similar to States. During the Reconstruction-Era the Territories were the governments of the areas of the United States that had not yet become States. *First Nat. Bank of Brunswick v. Yankton*, 101 U.S. 1046, 1047 (1880). "From the moment of their creation, the Territories were destined for admission as States into the Union. . . ."[7] *District of Columbia v. Carter*,

[7] This was not true for the later unincorporated territories, but the concept of unincorporated territories was not established until the Insular Cases of 1901. Leibowitz, *The Applicability of Federal Law to Guam*, 16 Va. J. Int'l. L. 21 at 27 (1975).

(Continued on following page)

409 U.S. at 431. Courts sometimes referred to Territories as quasi states or inchoate states. *Binns v. United States*, 194 U.S. 486, 491 (1904); *People of Puerto Rico v. Shell Co.*, 302 U.S. 261-62. "The scope of self government exercised under these delegations [i.e. exercised by Territories under their Organic Acts] was nearly as broad as that enjoyed by the States. . . ." *District of Columbia v. Carter*, 409 U.S. at 430-31, quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 546, *reh'g. denied*, 371 U.S. 854 (1962). The Territorial "legislatures [were] entrusted with the enactment of the entire system of municipal law" subject to Congressional veto; their powers were "nearly as extensive as those exercised by any state legislature"; and the Territorial courts, "like the state courts, [were] invested with plenary municipal jurisdiction." *Hornbuckle v. Toombs*, 85 U.S. (18 Wall.) 966, 968 (1874).[8] With this view of Territories, it would be expected that Congress would extend to them the full immunity of a sovereign government, subject only to its plenary control.

3. SECTION 1983 HAS THE "SAME FORCE AND EFFECT" IN THE TERRITORIES AND ON GUAM AS IN THE STATES.

The 1874 revision and consolidation of the federal laws sets out provisions common to all the Territories. Title 23, c.1,

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Also the governments of the unincorporated Territories are not significantly different than those of the incorporated Territories. *People of Porto Rico v. Rosaly y Castillo*, 227 U.S. 270, 273-74 (1913); *People of Puerto Rico v. Shell Co.*, 302 U.S. 253, 261-62 (1937).

[8] "Municipal law" may be properly defined to be a rule of civil conduct prescribed by any power in the state having, according to its constitution or form of government, authority to act. *Davis v. Ballard*, 24 Ky. (1 J.J. Marsh) 563, 565, 576, noted in *Words and Phrases*, "Municipal Corporations" 543 (1961).

Rev. Stat. §§1839-1895 (1874). Section 1891 provided that the "Constitution and all the laws of the United States which are not locally inapplicable shall have the same force and effect" in the organized Territories as elsewhere in the United States. This Court held, in *Will v. Michigan*, 109 S.Ct. 2304, 2308 (1989), that Congress did not intend to include States within the meaning of "person" in the 1871 Act. If the laws applicable to the Territories had the same "force and effect" in the Territories as in the rest of the United States, the Territories would not be included within the meaning of "person" either.

The Organic Act of Guam has a similar provision. In 1968, Fourteenth Amendment rights were specifically extended to Guam. 48 U.S.C. §1421b(u). The statute extending those rights provided that the provisions extended to Guam shall have the "same force and effect there [on Guam] as in the United States or the States of the United States." Therefore the people of Guam were afforded protection equal to, not greater than, the protection afforded people in the States. People in the States do not have the right to bring an action for damages under §1983 against the State unless the State has waived its immunity.

4. TERRITORIES ARE NOT MUNICIPAL CORPORATIONS.

Because Territories are under the plenary control of Congress, Petitioners equate them with municipalities. (Brief for Petitioners at 40) This is an incorrect categorization. A Territory is of the nature of a quasi corporation. Citing a number of treatises and numerous cases, the

Court in *Hanson v. City of Cresco*, 109 N.W. 1109 (Iowa 1906) gives a clear picture of the distinction between a quasi corporation and a municipal corporation. "A municipal corporation, in its strict and proper sense, is a body politic and corporate. . . ." 109 N.W. at 1111. In the case of a municipal corporation, the inhabitants of a particular area voluntarily associate together for the purpose of local self government pursuant to a corporate charter or general incorporation statute. A so-called quasi corporation is a distinctly different entity. It is the legislative creation of a sovereign and paramount authority, rather than a voluntary association. It is "one of the members or parts of the state". Id. Its "functions are entirely governmental." Id. See also *School Dist. No. 56 of Richardson Co., Neb. v. St. Joseph's Fire and Marine Ins. Co.*, 103 U.S. 601 (1881). "In this sense, the state itself, if properly described as a corporation at all, is a quasi, and not a municipal corporation. [citations]." *Hanson v. City of Cresco*, 109 N.W. at 1112. See also *Coffield v. Territory of Hawaii*, 13 Hawaii 478 (1901).

The Government of Guam was created by Congress to perform entirely governmental functions. Guam Organic Act, 64 Stat. 384-93 (codified as amended 48 U.S.C. §1421-1428e) (hereafter cited as the Organic Act). It, along with the States and other Territories, is one of the members or parts of the United States. The Government of Guam is not a voluntary organization of people coming together under a general law authorizing people to incorporate. Therefore the Government of Guam is not a municipal corporation. In 1901 a Hawaii Territorial Court recognized this distinction:

> To which form of government is that of the Territory most analogous? To that of a State of the United States or a political subdivision created as an instrumentality thereof, or to that of a municipal corporation proper? In our opinion Congress did not intend in creating the Territory to create a municipal corporation proper with the liabilities of such a corporation.

Coffield v. Territory of Hawaii, 13 Hawaii 478, 480-81. See also *County of Oahu v. Whitney*, 17 Hawaii 174, 180-81 (1905).

The majority opinion in *Will* held that the phrase "bodies politic and corporate" includes both "private and public (municipal) corporations", but it does not include the State. 109 S.Ct. at 2311. Likewise the phrase would not include a Territory, because a Territory is not a public (municipal) corporation. As a creation of the federal government, it is a quasi corporation. If there is to be a right of suit against a quasi corporation, the creating sovereign authority must bestow that right by waiving the immunity of its governmental offspring. This is the point made by the lower Court when it said "'[T]he government of Guam is an instrumentality of the federal government over which the federal government exercises plenary control' we concluded that '[t]here is no reason why Guam should enjoy less immunity than the federal government itself.'" *Ngiraingas*, 858 F.2d at 1371, *citing Sakamoto v. Duty Free Shoppers Ltd.*, 764 F.2d 1285, 1289 (9th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986).

This principal was recognized during the Reconstruction-Era.

The law recited in 1877 in *Brabham v. The Board of Supervisors of Hinds County*, 54 Miss. 363 (1877) *still applies today*. The Court there said:

* * *

"A county can have no liability except as authorized, expressly or by necessary implication, by some statute. Counties are political divisions of the State, created for convenience. They are not corporations with the right to sue and be sued as an incident to their being, but are quasi corporations, invested by statutes with certain powers, and subject to certain liabilities, and can neither sue nor be sued, except as authorized by statute. The right to maintain a suit like this against a county is not only outside of the contemplation of the statutes, but is opposed by every consideration of sound policy." 54 Miss. at 364.

Leflore Co. v. Big Sands Drainage Dist., 383 So.2d 501, 502-03 (Miss. 1980) (emphasis added). See also *Kroger Grocery & Baking Co. v. Harpole*, 166 So. 335 (Miss. 1936).

In *Monell*, 436 U.S. 658, this Court pointed out that the members of the 42nd Congress would have "understood 'persons' to include municipal corporations" because "municipal corporations were routinely sued in the federal courts and this fact was well known to Members of Congress." 436 U.S. at 686, 688. *Monell* involved a suit against two entities of a municipal corporation – the city of New York's Department of Social Services and its Board of Education.

In *Barnes v. District of Columbia*, 91 U.S. 440, 443 (1876) it was argued that a municipal corporation, as distinguished from a private corporation, was not liable

for negligence. Foreshadowing *Monell's* statement, this Court, in 1876 said:

> The authorities establishing the contrary doctrine that a city is responsible for its mere negligence, are so numerous and so well considered, that the law must be deemed to be settled in accord with them. [citations]

91 U.S. at 443.

However, this Court went on to point out the distinction between a municipal corporation and a quasi corporation.

> And here a distinction is to be noted between the liability of a municipal corporation, made such by acceptance of a village or city charter, and the involuntary quasi corporations known as counties, towns, school districts, and especially the townships of New England. The liability of the former is greater than that of the latter, even when invested with corporate capacity and the power of taxation.
>
> * * *
>
> *Whether this distinction is based upon sound principle or not, it is so well settled that it cannot be disturbed. Decisions or analogies derived from this source are of little value in fixing the liability of a city or a village.*

91 U.S. at 443-44 (emphasis added, citations omitted).

Although municipal corporations were routinely sued in the Reconstruction-Era, there existed a clearly recognized distinction between municipal corporations and so-called quasi corporations.

Therefore in 1871, when Congress passed §1 of the Civil Rights Act of 1871, and in 1874, when Congress

added Territories to the Act, there was a well known legal distinction between municipal corporations and so-called quasi corporations. This distinction was relevant to the issue of sovereign immunity. Municipal corporations were commonly sued, but quasi corporations, possessing the immunity of their sovereign creator, were not. Therefore, including municipal corporations within the meaning of "person," does not mean Congress also intended to include Territories.

5. TERRITORIES HAVE COMMON LAW SOVEREIGN IMMUNITY.

Whether or not Territories have immunity, and whether or not Congress intended to waive that immunity, establishes whether Congress intended Territories to be included within the meaning of "persons" under §1983.

In enacting §1 of the 1871 Civil Rights Act, Congress did not intend to override well established immunities under the common law. *Will*, 109 S.Ct. at 2309. Therefore, if Territories were immune from suit in 1871, it may be concluded that Congress did not intend to include them within the ambit of the term "person," absent evidence of Congress' intent to abrogate or waive the immunity.[9] See, *Quern v. Jordan*, 440 U.S. at 341, 350 (Brennan, J., concurring).

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[9] A waiver of sovereign immunity must be specific and explicit. *United States v. Shaw*, 309 U.S. 495 (1940); *Barefield v. Byrd*, 320 F.2d 455 (5th Cir. 1963), *cert. denied*, 376 U.S. 928 (1964).

At the time of enactment of §1 of the 1871 Act, it was the state of the common law that damage suits against Territorial governments were banned. In *Langford v. King*, 1 Mont. 33 (1868), the Montana Supreme Court held that the plaintiff, an assignee of the holder of a warrant from the Territory, could not sue the Territory for its failure to accept the warrant in payment of taxes. The Court said:

> Montana Territory is a government created, it is true, by a law of Congress. Yet that law gives it very extensive powers. The reason of the law, which declares that no government can be sued without its consent, applies to this territorial government as well as to any other government.
>
> We hold, therefore, that unless permitted by some law of this Territory, or of the general government, no citizen of this Territory can sue it. There is no law of this Territory or act of Congress permitting it. There is, then, no legal power to enforce territorial contracts.

1 Mont. at 38, *quoted in Fisk v. Cuthbert*, 2 Mont. 593, 598 (1877). See also *Coffield v. Territory*, 13 Haw. at 482; *Territory v. Doty*, 1 Pinney (Wis.) 396, 405 (1844).

In *Coffield v. Territory*, 13 Haw. at 482 the Hawaii Supreme Court said: "No cases has [sic] been produced in which a territory has been held liable to suit, and yet if it were considered liable there would naturally be such cases. There are references to cases which are not at hand which seem to hold the contrary even in cases in contract."

The immunity of Territorial governments from damage suits was among the well established immunities

Congress did not intend to override in enacting §1 of the 1871 Act.

Unincorporated Territories did not exist in 1871. However, unincorporated Territories, like Guam, enjoy the same common law sovereign immunity as incorporated territories. Although the Government of Guam lacks absolute sovereignty, it has attributes of sovereignty sufficient to call into play common law sovereign immunity. Unincorporated Territories possess "an autonomy similar to that of the states" (*People of Porto Rico v. Rosaly y Castillo*, 227 U.S. at 274) which necessarily allows suit "only in case of consent duly given" Id. In *Rosaly y Castillo*, specific provisions were made in the Organic Act of Puerto Rico for suits against the Territory. Nonetheless this Court held that the government established by the Organic Act was of such a nature that it could not be sued without its consent. See also *Kawananakoa v. Polyblank*, 205 U.S. 349, 354 (1907) (Hawaii); *Crain v. Government of Guam*, 195 F.2d 414 (9th Cir. 1952); *Marx v. Guam*, 866 F.2d 294 (9th Cir. 1989).

Petitioners argue that the traditional common law sovereign immunity of the Territories does not protect Guam from §1983 suits because "the Territory was not sued in its 'own court,' or under Territorial law." (Brief for Petitioners at 36)

The doctrine of common law sovereign immunity, as it was understood when §1 of the 1871 Act was enacted, not only precluded suit against the sovereign in its own courts without its consent, but also precluded suit in the

courts of other sovereigns as well.[10] In *Beers v. Arkansas*, 61 U.S. 527, 592 (1858), Mr. Chief Justice Taney observed that it "is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent or permission." See also *Cunningham v. Macon & Brunswick R.Co.*, 109 U.S. 446, 451 (1883); *Hans v. State of Louisiana*, 134 U.S. 1, 16 (1890) (The suability of a state, without its consent, was a thing unknown to the law.)

Thus, when §1 of the 1871 Act was enacted, the principle of common law sovereign immunity was understood to afford a State immunity from suit in the court of another sovereign, as well as in its own courts. Further support for this proposition is found in this Court's decisions of this century holding that the Eleventh Amendment, ratified in 1798, is but a "constitutionalization" of the intergovernmental immunity principles of common law sovereign immunity. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238, *reh'g. denied*, 473 U.S. 926 (1985); *Principality of Monaco v. State of Mississippi*, 292 U.S. 313, 322-23 (1934); *In Re State of New York*, 256 U.S. 490, 497 (1921); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98 (1984). These principles of intergovernmental immunity are applicable to all governments enjoying common law sovereign immunity. See *e.g., Fleming v. Dept. of Public Safety, Com. of Northern Mariana Islands*, 837

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[10] In *Nevada v. Hall*, 440 U.S. 410 (1978), this Court held that common law sovereign immunity does not immunize a state from suit in another state's courts. However, one hundred years earlier, this Court did not impose any limit on the immunity sovereigns enjoyed from suit in other sovereign's courts.

F.2d 401, 407 (9th Cir.), *cert. denied*, 109 S.Ct. 222 (1988). (There is simply no meaningful distinction between Eleventh Amendment immunity and common law sovereign immunity insofar as federal suits are concerned).

Thus, it is clear that the Eleventh Amendment was not the only source of immunity from suit in federal court. This amendment simply constitutionalized the immunity of States from suit in federal court. The immunity constitutionalized was already well established at common law when the Eleventh Amendment was ratified in 1798.

Contrary to Petitioners' argument, common law sovereign immunity also precludes suits against the sovereign brought under the law of another sovereign, as well as suits under its own laws. In *Owen v. City of Independence*, 445 U.S. 622, *reh'g. denied*, 446 U.S. 993 (1980), this Court considered whether common law sovereign immunity precluded a §1983 action against a municipality. This Court stated:

> In each of these [prior] cases, our finding of §1983 immunity "was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it."[citation] Where the immunity claimed by the defendant was well established at common law at the time §1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity. But there is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction

> of §1983 that would justify the qualified immunity accorded the city of Independence by the Court of Appeals.

445 U.S. at 638.

Hence, this Court has held that common law immunity prohibits a §1983 claim where a proper showing is made. Respondents have shown that Territories enjoyed common law sovereign immunity when §1 of the 1871 Act was enacted. Therefore the common law sovereign immunity of Territories should preclude a suit against them brought under 42 U.S.C. §1983, even though it is a federal claim brought in a federal court.

6. THE ORGANIC ACT OF GUAM ESTABLISHES HOW GUAM'S SOVEREIGN IMMUNITY CAN BE WAIVED.

Guam has two sources of immunity: Organic Act immunity and common law sovereign immunity. *Marx v. Guam*, 866 F.2d 294. Neither type of immunity has been waived for §1983 claims.

In 1950 Congress exercised its plenary power over the Territory of Guam by creating the Government of Guam. Act of August 1, 1950, c.512, §3, 64 Stat. 384. Guam's sovereign immunity is embodied in its Organic Act. (In upholding the sovereign immunity of the Territory of Hawaii, this Court, in *Kawananakoa*, 205 U.S. at 354, said, "[F]or the Territory of Hawaii it is enough to refer to the Organic Act.")

Section 3 of the 1950 Organic Act of Guam provided:

> Guam is declared to be an unincorporated territory of the United States and the capital and

> seat of government thereof shall be located at the city of Agana, Guam. The *government of Guam shall have the powers set forth in this chapter and shall have power to sue by such name.* The government of Guam shall consist of three branches, executive, legislative, and judicial, and its relations with the Federal Government shall be under the general administrative supervision of the head of such civilian department or agency of the Government of the United States as the President may direct.

Act of Aug. 1, 1950, c.512, §3, 64 Stat. 384 (codified as amended at 48 U.S.C. 1421(a)) (emphasis added).

Guam, under its Organic Act, was endowed with immunity characteristic of sovereign governments. See *e.g., Porto Rico v. Rosaly y Castillo*, 227 U.S. at 274; *Kawananakoa v. Polyblank*, 205 U.S. at 349, 353.

The Government of Guam's sovereign immunity was challenged in the United States Court of Appeals for the Ninth Circuit just two years after its Organic Act came into effect. *Crain v. Government of Guam*, 195 F.2d 414 (9th Cir. 1952). The challenge involved federal, not local, laws. Guam's Organic Act provided *inter alia:* "The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force on Guam." Act of Aug. 1, 1950, c.512 §31, 64 Stat. 392 (amended 1958, 1972, 1977). The case involved the application to Guam of the federal income tax law through §31 of the Organic Act. After discussing the nature of Guam's government, this Court, relying on *Kawananakoa*, 205 U.S. at 349 and *Rosaly y Castillo*, 227 U.S. 270, held that the suit was barred by Guam's sovereign immunity.

After *Crain*, in 1959, Congress amended §3 of the Organic Act to allow Guam's Legislature to waive the government's immunity in cases of contract and tort.

The Act as amended provided in relevant part:

> The government of Guam shall have the powers set forth in this Act, shall have power to sue by such name, and, *with the consent of the legislature evidenced by enacted law, may be sued* upon any contract entered into with respect to, or any tort committed incident to, the exercise by the government of Guam of any of its lawful powers. . . .

Act of Sept. 21, 1959, Pub. L. 86-316, 73 Stat. 588 (amended 1968) (emphasis added).

The legislative history of this amendment indicates that Congress felt the change was needed to authorize suits against the government.

NEED FOR LEGISLATION

> Although section 3 of the 1950 Guam Organic Act specifically provides for suits by the government of Guam in its own name, the law makes no provision for suits against it, even on contracts. It is doubtful, therefore, whether the Legislature of Guam could authorize such suits to be brought. This could well result in failures of justice in many instances. Enactment of H.R. 4603 will overcome this difficulty so far as the Congress is concerned and will cast the burden on the Legislature of Guam to enact or refuse to enact the necessary supplemental local legislation permitting suits to be brought. * * *

1959 U.S. Code Cong. and Ad. News 2660.

The purpose of the amendment is explained in a letter from the Assistant Secretary of the Interior.

> This [amendment], in effect, enables the Legislature of Guam to waive the sovereign immunity which was conferred upon the government of Guam by the Congress through enactment of the Guam Organic Act *when, in the Legislature's opinion, the best interests of both the people and the government of Guam would be served by allowing such an action to be brought.*

Id. 2660. (emphasis added)

Congress, therefore, did not overturn *Crain*. Instead it allowed the Guam Legislature, in spending the limited public funds in the government's treasury, to balance the expenditures for private litigants with the public goals of government.[11] Civil rights actions under §1983 would allow unlimited damages against Guam's treasury, in violation of the stated policy underlying the 1959 amendment.[12]

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[11] The Government of Guam has waived its immunity for contract actions and tort actions for negligence, (Guam Gov't. Code §6500.04(a) & (b)); and it has limited its liability to $100,000 in wrongful death cases and $300,000 in other tort cases (Guam Gov't. Code §6500.30(b)). The Legislature has not waived the government's immunity for §1983 actions.

[12] The total estimated general fund revenues for Guam for the fiscal year 1989 are $309,993,010. (This does not include specifically earmarked local revenues of $51,553,710 and federal grant-in-aid revenues of $14,350,922.) This information is contained in Guam Public Law 20-3, c.1, §1 which is set out in the appendix.

7. THE EXTENSION OF CIVIL RIGHTS TO GUAM DOES NOT STRIP AWAY ITS SOVEREIGN IMMUNITY.

Petitioners make two cloudy and interrelated arguments to the effect that the Organic Act at once grants Guam sovereign immunity and strips it away. (Brief for Petitioners at 37-45).

Due Process and Equal Protection were extended to the people of Guam in the 1950 Organic Act Bill of Rights. 48 U.S.C. §1421b (amended 1968). In 1968 the rights provided in the Fourteenth Amendment and the Fifth Amendment were specifically extended to Guam. 48 U.S.C. §1421b(u).

Petitioners argue that "[a]ny immunity conferred by Congress in the Organic Act, or the common law, is stripped by" Guam's Bill of Rights and the extension of the Fourteenth and Fifth Amendments to Guam. (Brief for Petitioners at 38). Petitioners then contend that by extending equal protection and due process to Guam, Congress impliedly withdrew the Territory's immunity from §1983 suits. (Brief for Petitioners at 40).

Petitioners claim that the Organic Act provisions are inconsistent and that Congress granted Guam sovereign immunity in 1950 but simultaneously took it away by enacting a Bill of Rights for Guam's citizens. Experience indicates that a legislature does not deliberately enact inconsistent provisions when it is cognizant of both, without expressly recognizing the inconsistency. Thus, all parts of a statute should be construed together. 2A *Sutherland Statutory Construction* §51.01 (4th ed. 1984). The most

reasonable interpretation of the various Organic Act provisions is that in 1950 Congress intended to hold individuals, not the Government of Guam, liable for constitutional violations.

Petitioners would extend Congress' waiver of Guam's sovereign immunity beyond what is provided for in the Organic Act. This Court has said in *United States v. Shaw*, 309 U.S. at 502: "It is not our right to extend the waiver of sovereign immunity more broadly than has been directed by the Congress." In 1959, Congress made its intent very clear when it amended Guam's Organic Act "to authorize suits against the Government of Guam, with the consent of the legislature." 1959 U.S. Code Cong. & Ad. News, at 2660.

As previously mentioned, legislative history shows that Congress' intent in amending the Organic Act was to allow the Government of Guam to decide when "the best interests of both the people and Government of Guam would be served by allowing such action to be brought." *Id.* at 2659.

Thus, Congress did not strip Guam of immunity by providing Guam citizens with constitutional rights. Guam citizens are not left without a remedy. Section 1983 claims can be brought against individuals. However, §1983 claims cannot be brought against the Government of Guam without the consent of the legislature.

8. CONGRESS HAS NOT IMPLIEDLY WAIVED GUAM'S SOVEREIGN IMMUNITY.

Petitioners' argument, that Congress' extension of constitutional rights impliedly waives immunity from actions based on a deprivation of those rights, applies, if at all, to municipal corporations, not Territories. Petitioners cite *Owen v. City of Independence, Mo.*, 445 U.S. 622, as support for their argument that by imposing an obligation on the Territory to respect the constitutional rights and liberties of its residents, Congress impliedly withdrew Guam's immunity from liability for the nonperformance or misperformance of its obligations. "[W]hen a State imposed a specific duty on a municipality within its governmental functions, immunity was impliedly withdrawn." (Brief for Petitioners at 42).

In *Owen*, the petitioner sued the City of Independence, the city managers and members of the city council in their official capacities for violation of his constitutional rights to procedural and substantive due process. This Court held that a municipality cannot assert the good faith of its officers as a defense to liability under §1983. Although §1983 does incorporate certain well established immunities, "there is no tradition of immunity for municipal corporations." 445 U.S. at 638.

> In each of these [prior] cases, our finding of §1983 immunity "was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." [citation] Where the immunity claimed by the defendant was well established at common law at the time §1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights

> Act, we have construed the statute to incorporate that immunity.[13]
>
> *Id.*

Guam is of the nature of a quasi corporation. It is not a municipal corporation. Quasi corporations historically were not stripped of immunity when specific duties were imposed.

> "In the United States, *there is no common-law obligation* resting upon *quasi corporations*, such as counties, townships, and New England towns, to repair highways, streets, or bridges within their limits, and they are not obliged to do so unless by force of statute. Even when the legislature enjoins upon corporations of this character the duty to make and repair roads, streets, and bridges, and confers power to levy taxes therefor, the general tenor of the decisions is to treat this as a *public*, and not a *corporate*, duty, and to regard such corporations, in this respect, as *public or State agencies*, and not liable to be sued civilly for damages caused by the neglect to perform this duty, unless the action be expressly given by statute;" but, "The general doctrine of American courts * * * in *respect of municipal corporations proper*, has been to hold them civilly liable for injuries from defective streets." This distinction may not be based altogether on sound reasoning but it is well established.

---

[13] This demonstrates the fallacy of Petitioners' bold assertion that "section 1983 which was designed to enforce the Fourteenth Amendment . . . *also abrogates any sovereign immunity which may have existed by virtue of common law.*" (emphasis added) (Brief for Petitioners at 43)

Coffield v. Territory of Hawaii, 13 Hawaii at 480, quoting 2 Dill. Man. Corp. §§997, 998. See also *Leflore County*, 383 So. 2d at 502 (counties are quasi corporations and can neither sue nor be sued, except as authorized by statute), citing *Brabham v. The Board of Supervisors of Hinds County*, 54 Miss. 363 (1877).

Thus, Petitioners' reliance on *Owen* is misplaced. *Owen* addressed only municipal corporations, not quasi corporations or Territories.[14] Under the *Owen* analysis, the historical immunity for quasi corporations would be incorporated into §1983. Since Guam is in the nature of a quasi corporation, its immunity must be waived by statute.

Petitioners also cite the cases of *Ocasio v. Bryan*, 374 F.2d 11 (3d Cir. 1967) and *Frett v. Government of Virgin Islands*, 839 F.2d 968 (3d Cir. 1988) for their line of reasoning that the Territory of the Virgin Islands is a person subject to liability under §1983 and that Congress did not intend to confer on the Government of the Virgin Islands an immunity from tort actions based on the constitution and laws of the United States greater than that enjoyed

---

[14] The *Monell* holding applied to municipal corporations. The Court discussed *Monroe v. Pape*, 365 U.S. 167 (1961) as being a "departure from prior practice", 436 U.S. at 695, and cited five cases in which *municipalities* were defendants in §1983 suits: *Northwestern Fertilizer Co. v. City of Hyde Park*, 18 Fed. Cas. 393 (No. 10336) (C.C. N.D. Ill. 1873); *City of Manchester v. Leiby*, 117 F.2d 661 (1st Cir.), *cert. denied*, 313 U.S. 562 (1941) (City of Manchester, Chief of Police, Justice of Municipal Court); *Hanman v. City of Haverhill*, 120 F.2d 87 (1st Cir.), *cert. denied*, 314 U.S. 641 (1941) (City of Haverhill); *Douglas v. City of Jeannette*, 319 U.S. 157, *reh'g. denied*, 319 U.S. 782 (1943) (City of Jeannette); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (City of Atlanta).

by the states and their subdivisions. *Frett* and *Ocasio* are *pre-Will* cases and thus do not have the benefit of this Court's analysis in *Will* which found that States are not persons under §1983. Furthermore, neither the *Frett* nor the *Ocasio* court addressed the historical distinctions between municipal corporations and Territories in regard to sovereign immunity. In fact the *Frett* court affirmed the District Court's holding that the Government of the Virgin Islands was subject to the same liability in tort under §1983 "as any other governmental entity." *Frett*, 389 F.2d at 977. This broad generalization cannot withstand *Owen's* requirement of a "considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." 445 U.S. at 638.

Section 1983 and Guam's Organic Act should be construed so as to give effect to both statutes:

> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. 'When there are two acts upon the same subject, the rule is to give effect to both if possible.'

Morton v. Mancari, 417 U.S. 535, 551 (1974), citing *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

> The problem is one of construing two statutes, neither enacted in any obvious contemplation of the other but each bearing upon the other when both are involved in the factual situation presented. In such circumstances, we should seek a solution which avoids violence to the terms of either but which brings both into correlation, since to construe either in isolation from the other would thwart the intention of Congress.

United States v. Dunn, 545 F.2d 1281 (10th Cir. 1976).

The Government of Guam's sovereign immunity under the Organic Act can be read harmoniously with the provisions of §1983. The Civil Rights Act has always applied on Guam, but it does not authorize suits against the Territorial government. When Congress, in the 1959 amendments to the Organic Act, allowed an exception to Guam's sovereign immunity for tort and contract actions if consented to by Guam's legislature, it did not include an exception for §1983 claims. It is reasonable to conclude that Congress did not intend such an exception. This interpretation harmonizes the two statutes and gives effect to the intent of both laws. Redress for civil rights violations can be brought against individuals and the Guam legislature can decide the extent of the government's liability in tort and contract.

Furthermore, §1983 is a general statute with seemingly broad application. The sovereign immunity provision of the Organic Act is specific. Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment. *Crawford Fitting Co. v. J.T. Gibbons Inc.*, 482 U.S. 437, 445 (1987). Thus, the specific provisions of the Organic Act cannot be diluted by the broad statements in §1983.

CONCLUSION

For the reasons stated in this brief, Respondents respectfully request that this Court affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

ELIZABETH BARRETT-ANDERSON
Attorney General

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APPENDIX

BE IT ENACTED BY THE PEOPLE OF THE TERRITORY OF GUAM:

CHAPTER I

Section 1. Section 1 of Chapter I of P.L. 19-10 is repealed and reenacted to read;

"**§ 1. Short title, effective date.** This Act may be cited as the General Appropriation Act of 1989, unless otherwise provided for within the Act. Except as otherwise provided by this Act, the appropriations made by the Act shall be available to pay for obligations incurred on or after October 1, 1988, but not later than September 30, 1989. In the event that any portion of this Act is found contrary to Federal Law, all portions of the Act not so found shall remain valid."

Section 2. Section 2 of Chapter I of P.L. 19-10 is hereby repealed and reenacted to read:

"**§ 2. Estimated Revenues.** The Legislature adopts the following as its revenue forecast for Fiscal Year 1989:"

I. GENERAL FUND REVENUES	
A. Taxes	AMOUNT
Income Taxes (Corporate & Individual)	$157,658,930
Federal Income Tax Collection (Sec. 30 Funds)	37,970,222
Gross Receipts Tax	86,479,262
Real Property Tax	6,580,000
Others	5,329,191
B. Business License & Other Licenses & Permits	1,980,364

C.	Use of Money & Property	
	Interest/Rental	2,025,000
	Immigration Fees	305,931
	Fines	50,801
D.	Charges for Public Services	4,940,594
E.	Other Revenues	1,679,705
F.	GMH CIP - Appropriated pursuant to PL 15-135	3,240,180
G.	GMH CIP - Appropriated pursuant to PL 18-48	1,692,830
H.	GMH CIP - Appropriated pursuant to PL 18-007	60,000
	TOTAL GENERAL FUND REVENUE	$309,993,010
II.	**SPECIAL FUND REVENUES (LOCAL)**	
	Tourist Attraction Fund	9,416,174
	Housing Revolving Fund	449,840
	Abandoned Vehicle & Streetlight Fund	330,000
	Guam Contractors License Board	330,000
	Land Survey Revolving Fund	250,000
	Parks Fund	132,027
	Professional Engineers & Architects Fund	125,016
	Special Surplus Property Fund	101,077
	Public Utility Agency of Guam Fund	11,563,544
	Guam Memorial Hospital Fund	28,856,032
	TOTAL SPECIAL FUND REVENUE	$ 51,553,710
III.	**FEDERAL GRANTS-IN-AID REQUIRING LOCAL MATCH**	
	Civil Defense	113,894
	Public Health & Social Services	9,815,032
	University of Guam	1,298,746
	Library	73,016
	Guam Environmental Protection	1,243,225

Agriculture	193,973
Labor	69,666
Vocational Rehabilitation	1,321,370
Guam Council on the Arts & Humanities	222,000
TOTAL FEDERAL GRANTS-IN-AID REVENUE	$ 14,350,922
REVENUE SUMMARY:	
TOTAL GENERAL FUND REVENUE	309,993,010
TOTAL SPECIAL FUND REVENUE	51,553,710
TOTAL FEDERAL GRANTS-IN-AID REVENUE	14,315,390
GRAND TOTAL	$375,862,110

AMICUS CURIAE

BRIEF

(8)

No. 88-1281

Supreme Court, U.S.
FILED
DEC 19 1989
...OL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

ALEX NGIRAINGAS, ET AL., PETITIONERS

v.

FRANCISCO Q. SANCHEZ, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the Territory of Guam or its officers, acting in their official capacities, are subject to suit under 42 U.S.C. 1983.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

The United States has an interest in this case for several reasons. Guam became a Territory of the United States in 1899 pursuant to the Treaty of Paris that ended the Spanish-American War. The Organic Act of Guam, ch. 512, § 2, 64 Stat. 384 (codified at 48 U.S.C. 1421). Since then, the United States has granted Guam considerable latitude to exercise self-government.[1] Congress retains authority, however, to modify or repeal the laws of Guam,[2] and has designated the Department of the

[1] See 48 U.S.C. 1421a (stating that the government of Guam shall have executive, legislative, and judicial branches), 1422-1422c (defining the powers of the executive branch of Guam), 1423-1423*l* (defining the powers of the legislative branch of Guam), 1424-1424c (defining the powers of the judicial branch of Guam).

[2] 48 U.S.C. 1421c. Congress, however, has never exercised that authority in the case of Guam.

Interior as the agency to supervise the relationship between the United States and Guam, 48 U.S.C. 1421a. The United States filed an amicus brief at the petition stage in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners, various residents of the Territory of Guam, brought this action under 42 U.S.C. 1983 in the federal district court of Guam. The defendants were the government of Guam, the Guam Police Department, the director of the Guam Police Department in her official capacity, and various Guam police officers in their official and individual capacities. Pet. App. A2. The complaint alleged that the respondent police officers arrested petitioners and took them to Guam police headquarters, where petitioners were assaulted and forced against their will to sign "Rights Waiver" forms and to give incriminating statements. *Ibid.* The complaint also alleged that these actions were "taken pursuant to a *de facto* policy of the government of Guam" physically to harass and intimidate persons accused of crime, a policy that was allegedly "known [to] and encouraged by" the government. J.A. 16. Petitioners claimed, *inter alia*, that these actions violated rights protected by the Fifth and Fourteenth Amendments to the Constitution and various federal laws. J.A. 19. They sought compensatory and punitive damages totaling $100 million. J.A. 20.

2. The district court of Guam granted respondents' motion to dismiss. Pet. App. A1-A13. The court held that, by virtue of the Organic Act of Guam, 48 U.S.C. 1421 *et seq.*, the government of Guam possesses sovereign immunity from suit, and that neither Congress nor the Guam legislature has waived that immunity with respect to suits brought under Section 1983. Pet. App. A4-A5. The court held that sovereign immunity also barred petitioners' action against the individual defendants in their official capacities, because any judgment against them would "expend itself on the public treasury." *Id.* at A6; J.A. 27.[3]

3. Petitioners appealed, and the court of appeals affirmed in part and reversed in part. Pet. App. A35-A51.[4]

a. The court held that the government of Guam could not be sued under Section 1983 because Guam is an instrumentality of the federal government similar to an administrative agency, and therefore is not a "person" within the meaning of 42 U.S.C. 1983. Pet. App. A40-A42. For the same reason, the court held that the Guam Police Department is not a "person" under Section 1983. Pet. App. A42. Finally, the court held that Guam police officials may not be sued in their official capacities under Section 1983. The court reasoned that a judgment against those respondents in their official capacities would expend itself against the public treasury and therefore was, in effect, a suit against the government of Guam itself. Pet. App. A43-A44. Because the court of appeals held that Guam is not a "person" for purposes of Section 1983, it did not decide whether Guam enjoyed sovereign immunity from suit under that statute. Pet. App. A25 n.2.

b. The court held that respondent police officers could be sued under Section 1983 in their individual capacities to the extent they were not entitled to immunity. Pet. App. A44-A48. In the court's view, respondent officers

[3] The court dismissed the Section 1983 claims against the respondent police officers in their individual capacities on the ground that the suits were barred by the statute of limitations. Pet. App. A6-A9. The court also dismissed without prejudice petitioners' pendent claims based on Guam tort law. *Id.* at A9-A11.

[4] The court of appeals' initial opinion is reprinted at Pet. App. A17-A34. The court of appeals' revised opinion is reprinted in the petition appendix, but the pages are not numbered. We will refer to the court's revised opinion as if it were sequentially numbered from A35 to A51.

were not entitled to immunity from suit in their individual capacities by virtue of the Organic Act of Guam, 48 U.S.C. 1421a, because that provision applied only to suits against the government of Guam (and perhaps to government officials acting in their official capacities). Pet. App. A45-A46. At the same time, the court held that the respondent officers were entitled to invoke qualified immunity under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), for their actions. Pet. App. A46-A48. Because the district court had not addressed the merits of respondents' qualified immunity claims, the court of appeals ordered the district court on remand to determine whether the defendants were entitled to immunity on that ground. *Id.* at A48.[5]

SUMMARY OF ARGUMENT

1. The Territory of Guam is not a "person" subject to suit under 42 U.S.C. 1983. That conclusion, supported both by the language of Section 1983 itself and by its historical context, is buttressed by this Court's holding last Term in *Will* v. *Michigan Dep't of State Police*, 109 S. Ct. 2304 (1989), that a State is not a "person" within the meaning of that provision. Since *Will* relied in part on the Eleventh Amendment, which does not apply to Guam, the decision is not controlling, but its rationale is relevant in several respects. First, the reasoning of *Will* that "in common usage, the term 'person' does not include the sovereign," *id.* at 2308, is applicable to the Territories as

[5] The court also held that petitioners' claims against the respondent police officers in their individual capacities were not barred on statute of limitations grounds. Pet. App. A48-A50. Because the court of appeals reinstated petitioners' Section 1983 claims against those respondents, the court also reversed the district court's dismissal of the pendent Guam law tort claims as to those respondents. *Id.* at A50. The court of appeals left to the district court on remand the question whether to exercise pendent jurisdiction over the Guam law tort claims as to the remaining defendants. *Ibid.*

well as to the States. Second, the structure of Section 1983 indicates that States and Territories are to be accorded equivalent treatment, and it would be equally awkward to describe a Territory as acting "under color of" its own law as to describe a State in those terms. Third, *Will*'s recognition that "Congress [in Section 1983] did not intend to override well-established immunities or defenses under the common law," 109 S. Ct. at 2309, is also applicable to the Territories. Sovereign immunity of the Territories was consistently recognized at the time Section 1983 was amended to include them, and that immunity was confirmed by this Court when the question was presented to it. Fourth, the legislative history of Section 1983 lends no support to the view that a Territory is a "person" under that provision. Finally, Congress has legislated for the Territory of Guam with sovereign immunity principles in mind, and thus Guam may be readily analogized to those Territories whose immunity was well recognized when Section 1983 was amended to cover them.

Petitioners' reliance on *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658 (1978), is misplaced. In holding that a municipality is a "person" within the meaning of Section 1983, *Monell* stressed the contemporary understanding that municipal corporations "should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Id.* at 687. Territories, on the other hand, were at that time regarded as sovereign entities, and were (like the States) to be treated as such.

If Guam is not a "person" under Section 1983, it follows that officers of Guam cannot be sued for damages in their official capacity under that law. See *Will*, 109 S. Ct. at 2311.

2. Even if Guam is a "person" within the meaning of Section 1983, it may invoke sovereign immunity in a damages action brought against it under that provision.

When Section 1983 was made applicable to the Territories, the doctrine of territorial sovereign immunity was sufficiently embraced within established sovereign immunity principles that Congress should not be presumed to have abrogated it. Moreover, recognition of such immunity would not nullify a determination that a Territory is a "person," since a damages action against the Territory itself would be available whenever the Territory waived its immunity or Congress chose to override it in a particular context.

The sovereign immunity of Guam is confirmed by the provisions of its Organic Act. As amended in 1959, 48 U.S.C. 1421a, that Act authorizes the Guam legislature at its discretion to waive the Territory's immunity from suit. Thus the question in this case should be whether and to what extent such a waiver has occurred.

Petitioners err in contending that Guam is entitled to sovereign immunity only in the courts of Guam and only for claims brought under Guam law. Guam and the United States are not wholly separate sovereigns; to the contrary, Guam derives its sovereignty from federal law. And in any event, well-established principles of sovereign immunity recognize that the doctrine is not rendered inapplicable because a sovereign is sued in the courts of another sovereign or under a law other than its own.

If Guam may claim sovereign immunity in this action, that immunity may also be claimed on behalf of officers of Guam sued in their official capacity.

ARGUMENT

NEITHER THE GOVERNMENT OF GUAM NOR ITS OFFICERS, ACTING IN THEIR OFFICIAL CAPACITIES, ARE SUBJECT TO SUIT UNDER 42 U.S.C. 1983

A. The Territory Of Guam Is Not A "Person" Under Section 1983

This case involves the question whether an action for damages may be brought against the government of Guam under 42 U.S.C. 1983. Section 1983 provides a remedy for an individual whose rights under federal law have been violated by any "person" who acts "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia." Petitioners contend that the Government of Guam, the Guam Police Department, and the officers themselves, in their official capacities, are "person[s]" within the meaning of Section 1983, and that Guam itself is a "Territory" under that statute.

We readily agree that Guam is a "Territory" for purposes of Section 1983.[6] But that conclusion does not re-

[6] The text of 42 U.S.C. 1983 does not define the term "Territory," and the legislative history is not illuminating. Section 1983 stems from Section 1 of the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13, which applied only to action taken under the color of law of any "State." The accompanying phrase "or Territory" was added to the 1871 Act without explanation in the 1874 codification and revision of the Statutes at Large, Rev. Stat. § 1979. *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 582 (1976); *District of Columbia* v. *Carter*, 409 U.S. 418, 424 n.11 (1973). Congress could not have had Guam specifically in mind when the Statutes at Large were adopted in 1874, since Guam did not become an American possession until it was ceded by Spain to the United States in 1898 in the Treaty of Paris. See the Organic Act of Guam, ch. 512, § 2, 64 Stat. 384 (codified at 48 U.S.C. 1421).

Nonetheless, Guam is clearly a "Territory" within the meaning of Section 1983. Because a "Territory" is not a "State" within the meaning of the Fourteenth Amendment, the phrase "or Territory" was "presumably" added to Section 1983 as "an exercise of Congress' power to regulate the territories under Art. IV, § 3,

solve this case, because the government of Guam cannot be sued under Section 1983 unless it is also a "person" within the meaning of that law. The court of appeals held that it was not, on the ground that the plenary control over Guam exercised by the federal government meant that "Guam, like the federal government, should not be held liable on the same terms as other entities." Pet. App. A41. As a "creature of the federal government," in other words, Guam was not one of the "bodies politic" included in the statute. *Ibid.*

Although we have difficulty with the Ninth Circuit's reasoning,[7] we agree with its ruling that Guam is not a

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cl. 2," *Carter*, 409 U.S. at 425 n.11, in order "to insure that all persons residing in the Territories not be denied, by persons acting under color of territorial law, rights guaranteed them by the Constitution and the laws of the United States." *Examining Board*, 426 U.S. at 582-583. Guam qualifies as a "Territory" within the meaning of that law. Although Guam became a United States possession in 1898, 48 U.S.C. 1421, Congress enacted no legislation concerning the island until it passed the Organic Act of Guam in 1950 (codified as amended at 48 U.S.C. 1421-1424 (1982 & Supp. V 1987)). See generally Liebowitz, *The Applicability of Federal Law to Guam*, 16 Va. J. Int'l L. 21, 21 (1975). The Guam Organic Act declares Guam to be an "unincorporated territory," and establishes its government with executive, legislative, and judicial branches. 48 U.S.C. 1421a. See S. Rep. No. 2109, 81st Cong., 2d Sess. 4, 13 (1950); H.R. Rep. No. 1677, 81st Cong., 2d Sess. 5, 12 (1950) (committee reports on the Organic Act of Guam, both stating that Guam is an unincorporated Territory of the United States). The Ninth Circuit has applied Section 1983 to Guam in the past. *Bunyan* v. *Camacho*, 770 F.2d 773 (1985) (applying Section 1983 without addressing the question whether Guam is a "Territory"), cert. denied, 477 U.S. 903 (1986). See *Fleming* v. *Department of Public Safety*, 837 F.2d 401, 404-405 & n.2 (construing *Bunyan* as having held that Section 1983 applies to Guam), cert. denied, 109 S. Ct. 222 (1988). See also House Comm. on Interior and Insular Affairs, *Report of the Commission on the Application of Federal Laws to Guam*, H.R. Doc. No. 212, 82d Cong., 1st Sess. 15 (1951) (listing 42 U.S.C. 1983, then codified at 8 U.S.C. 43 (1946), among the statutes of the United States that are applicable in Guam).

[7] The Ninth Circuit relied on its earlier decision in *Sakamoto* v. *Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1289 (1985), cert. denied,

"person" within the meaning of Section 1983. The available evidence of congressional intent points in that direction, and the conclusion that a Territory is not a "person" under Section 1983 is strengthened by this Court's decision last Term in *Will* v. *Michigan Dep't of State Police*, 109 S. Ct. 2304 (1989), that a State is not a "person" under that law.

Petitioners contend that *Will* is inapposite because the Eleventh Amendment, which played a role in this Court's reasoning in that case, is inapplicable to Guam. Pet. Br. 17-22. We agree that *Will* is not controlling here, for several reasons. Section 1983 refers separately to States and to Territories, and these two types of public bodies are plainly distinct under the Constitution. Moreover, the Court in *Will* not only drew on the Eleventh Amendment as part of its reasoning,[8] it also limited its holding to

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475 U.S. 1081 (1986), which characterized Guam as a federal instrumentality for purposes of the federal antitrust laws. Pet. App. A41. The question in this case, however, involves a different statute, and the status of Guam under that statute should be considered in light of its text, purposes, and legislative history. See *Carter*, 409 U.S. at 429; *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 258 (1937). Congress's decision in 1874 to add the Territories to Section 1983 indicates an intent to treat them not as part of the federal government for purposes of this law, but in the same manner as the States. Thus, it seems more appropriate to analogize the Territories to the States than to the federal government when determining their status under Section 1983.

[8] The Court in *Will* reasoned as follows:

First, if a State were a "person," the wording of the 1871 Act (which refers to a person acting "under color of" state law) would be "a decidedly awkward way of expressing an intent to subject the States to liability." *Will*, 109 S. Ct. at 2308. Thus, the statute provides no reason to depart from the "often-expressed understanding that '* * * the term "person" does not include the sovereign.'" *Ibid.* (citations omitted). This awkwardness is especially significant because the liability created by the Act was novel. *Ibid.*

Second, the text of Section 1983 falls far short of the clarity necessary to satisfy the clear statement rule articulated in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985) (a case involving the Eleventh Amendment), and similar cases affecting

"States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes." 109 S. Ct. at 2311. The Eleventh Amendment does not apply to Guam. See 48 U.S.C. 1421b(u) (omitting the Eleventh Amendment from the various constitutional amendments made applicable to Guam). Nevertheless, the *Will* decision, particularly its analytical approach to the question at issue there, supports the judgment below in several respects.

1. *Will* reiterated the proposition that "in common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it." 109 S. Ct. at 2308 (citation and internal quotation marks omitted). Moreover, *Will* found that the text of Section 1983 provides no reason to depart from that "often-expressed understanding." *Ibid.* That usage of the term "person," *Will* held, supported

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state interests and the federal-state balance. *Will*, 109 S. Ct. at 2308-2309.

Third, since one purpose of Section 1983 was to make a federal forum available for plaintiffs, and since Section 1983 did not abrogate the States' Eleventh Amendment immunity, *Quern* v. *Jordan*, 440 U.S. 332 (1979), it appears that Congress did not intend to provide a remedy against the States that was not available in federal court. *Will*, 109 S. Ct. at 2309.

Fourth, Section 1983 does not override well-established common law immunities or defenses, and sovereign immunity was a familiar principle at common law. *Will*, 109 S. Ct. at 2309.

Fifth, nothing in the legislative history of Section 1983 suggests that Congress intended to bring the States within the scope of that Section's coverage. *Will*, 109 S. Ct. at 2309-2310.

Sixth, the Dictionary Act, Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431, which provided in 1871 that "in all acts hereafter passed * * * the word 'person' [extends to] bodies politic and corporate," referred to such public corporations as municipalities, not to the States. *Will*, 109 S. Ct. at 2310-2311.

Finally, the holding of *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658 (1978), that municipalities are "person[s]" under Section 1983, is not controlling, because municipalities are not considered part of the State for Eleventh Amendment purposes. *Will*, 109 S. Ct. at 2311.

the conclusion that the States were not subject to liability under Section 1983.

That understanding is also applicable to the Territories. As long ago as 1871, the year in which the original version of Section 1983 was passed, this Court recognized the sovereign character of the Territories. "The theory upon which the various governments for portions of the territory of the United States have been organized," Chief Justice Chase explained, "has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of National authority, and with certain fundamental principles established by Congress." *Clinton* v. *Englebrecht*, 80 U.S. (13 Wall.) 434, 441 (1871). See E. Pomeroy, *The Territories and the United States 1861-1890*, at 3, 92-93 (1947). Beginning with the Northwest Ordinance of 1787, Congress provided for the Territories in their organic laws "the typical American governmental structure, consisting of the three independent departments—legislative, executive, and judicial"—characteristic of the federal and state systems. *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 262 (1937). At the same time, Congress granted to the Territories governmental power and autonomy equivalent (or nearly so) to that exercised by the States by vesting in the territorial governments "[t]he power of taxation, the power to enact and enforce laws, and other characteristically governmental powers." *Ibid.* See also, *e.g.*, *Cope* v. *Cope*, 137 U.S. 682, 684 (1891); *Hornbuckle* v. *Toombs*, 85 U.S. (18 Wall.) 648, 655-656 (1873). By so doing, "'[a] body politic'—a commonwealth—was created" that possessed the attributes of sovereignty. *Puerto Rico* v. *Shell Co.*, 302 U.S. at 262. As the Court explained in *Puerto Rico* v. *Shell Co.*, "[t]he effect" of granting a Territory such autonomy "was to confer upon the territory many of the attributes of *quasi*-sovereignty possessed by the states—as, for example, immunity from suit without their consent." 302 U.S. at 262 (citing *Porto Rico* v. *Rosaly*, 227 U.S. 270

(1913) (Territory of Puerto Rico possesses sovereign immunity)). See also *Kawananakoa* v. *Polyblank*, 205 U.S. 349, 353-354 (1907) (Territory of Hawaii enjoys sovereign immunity).

That principle is applicable to Guam. The Organic Act of Guam declares Guam to be an "unincorporated territory" and establishes its government with executive, legislative, and judicial branches, authorized to act as the sovereign over its internal affairs. The Organic Act of Guam, ch. 512, §§ 3, 6-24, 64 Stat. 384, 386-390; 48 U.S.C. 1421a-1424c; S. Rep. No. 2109, 81st Cong., 2d Sess. (1950); H.R. Rep. No. 1677, 81st Cong., 2d Sess. (1950). In the Organic Act, Congress also established a government for Guam patterned after the form of government created for the Territories of Hawaii and Puerto Rico. H.R. Rep. No. 1677, *supra*, at 4; *id.* at 6 (Letter from Interior Secretary Krug to House Speaker Rayburn). See *id.* at 12 (Analysis of H.R. 7273, 81st Cong., 2d Sess. (1950)). And this Court had previously held that both Hawaii and Puerto Rico possessed sovereign immunity on the ground that the government created for those Territories was modeled on the structure created by Congress for the Territories in the Continental United States and adopted by the States for themselves. *Porto Rico* v. *Rosaly*, 227 U.S. at 273-274; *Kawananakoa* v. *Polybank*, 205 U.S. at 353-354. Thus, because Guam possesses a form of government and enjoys a degree of autonomy similar to that of Territories that later became States (such as Hawaii), to that of Territories that still have that status and enjoy sovereign immunity (such as Puerto Rico), and to that of the States themselves, the "common usage" of the term "person" as interpreted in *Will* should no more include Guam than it does the States.

2. The structure of Section 1983 is also significant in this regard. Its text uses the phrase "State or Territory" and thereby implies that each entity has the same legal

status as the other for purposes of that law. Under a natural reading of this phrase, if a "State" is not a "person," neither is a "Territory." Indeed, a contrary reading would lead to the same interpretive oddity *Will* discerned in construing the term "person" to include a "State." It is equally awkward to describe a "Territory" as acting "under color of" its own law as it is to describe a State in those terms. Compare *Will*, 109 S. Ct. at 2308. Thus, it is unlikely that Congress intended by this wording to impose liability in damages on the territorial governments. And that is particularly so because, as explained below, the imposition of financial liability on the Territories for the acts of their officials would have been no less novel in the 1870s than would the imposition of such liability on the States. Compare *ibid.*

3. *Will* acknowledged this Court's consistent holdings that, in enacting Section 1983, "Congress did not intend to override well-established immunities or defenses under the common law." 109 S. Ct. at 2309 (collecting cases). That principle is directly applicable here. Sovereign immunity was a well-settled principle at common law in the 1870s when Section 1983 was enacted, *id.* at 2309-2310, and the territorial courts had ruled that the Territories, like the States, were immune from suit absent their consent, *Wisconsin* v. *Doty*, 1 Pin. 396, 407 (Wis. 1844);[9] *Langford* v. *King*, 1 Mont. 33, 38 (1868).[10] See also *Beachy* v. *Lamkin*, 1 Idaho 50, 52 (1866); *Fisk* v. *Cuthbert*, 2 Mont. 593, 598 (1877). When the question arose after the turn of the century, this Court, too, held that Territories enjoyed sovereign immunity because, like the

[9] "For all necessary purposes of government, Wisconsin is as a sovereignty, and should be entitled to the same immunities." *Wisconsin* v. *Doty*, 1 Pin. at 407.

[10] "Montana Territory is a government created, it is true, by a law of Congress. Yet that law gives it very extensive powers. The reason of the law, which declares that no government can be sued without its consent, applies to this territorial government as well as to any other government." *Langford* v. *King*, 1 Mont. at 38.

federal and state governments, they are sovereign entities. *Kawananakoa* v. *Polyblank*, 205 U.S. at 353; *Porto Rico* v. *Rosaly*, 227 U.S. at 273; *Porto Rico* v. *Emmanuel*, 235 U.S. 251, 257 (1914); *Puerto Rico* v. *Shell Co.*, 302 U.S. at 262. Indeed, in *Porto Rico* v. *Rosaly*, 227 U.S. at 274, the Court noted that "the incorporated Territories have always been held to possess an immunity from suit." [11] Thus, the state sovereign immunity principles that formed the background to the adoption of the original version of Section 1983 in 1871 have strong parallels in the case of the Territories.

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[11] In using the term "incorporated Territories," *Rosaly* referred to the two-part classification scheme developed by this Court in a series of cases decided at the turn of the century that has come to be known as the *Insular Cases*, *e.g.*, *De Lima* v. *Bidwell*, 182 U.S. 1 (1901); *Dooley* v. *United States*, 182 U.S. 222 (1901); *Armstrong* v. *United States*, 182 U.S. 243 (1901); *Downes* v. *Bidwell*, 182 U.S. 244 (1901). "Incorporated Territories" are Territories destined for statehood from the time of their acquisition (such as Wisconsin and Montana), while "unincorporated Territories" are Territories not acquired in anticipation of statehood. *Examining Board*, 426 U.S. at 599 n.30. Guam fits into the latter category. Indeed, Guam is expressly defined by Section 3 of the Organic Act of Guam, ch. 512, 64 Stat. 384 (codified at 48 U.S.C. 1421a) as an "unincorporated territory." That distinction, however, is immaterial in this case, for three reasons.

First, the difference between incorporated and unincorporated Territories did not exist in 1874, and Congress obviously could not have had in mind a distinction this Court did not announce until a quarter century later. The relevant question is the state of the law in 1874, and the law then was that all Territories could invoke sovereign immunity. *Second*, Guam is entitled to invoke sovereign immunity under this Court's decision in *Puerto Rico* v. *Rosaly*, *supra*. In that case, the Court held that Puerto Rico, an unincorporated Territory, could invoke sovereign immunity because the government created for that Territory—one with "legislative, judicial, and executive authority"—"is of such nature as to come within the general rule exempting a government sovereign in its attributes from being sued wihout its consent." 227 U.S. at 273, 274. That was so because the authority given to the government of Puerto Rico was similar to the powers given to the incorporated Territories and to Hawaii, both of which were entitled to invoke sovereign immunity, *Ibid.* (citing *Kawananakoa* v. *Polyblank*, *supra*), and because Congress had conferred on Puerto Rico " 'an autonomy similar to that of the States,' " 227 U.S. at 274 (quoting *Gromer* v. *Standard Dredging Co.*, 224 U.S. 362, 370 (1912)). The same is true here, for the reasons given in the text. See pp. 11-12, *supra*. *Third*, as explained in the text below, Congress has expressly authorized Guam to invoke sovereign immunity. See 48 U.S.C. 1421a.

4. The legislative history of Section 1983 lends no support to the contention that, notwithstanding the language and structure of the provision, Congress intended to render territorial governments financially liable for the unlawful actions of their officers. Section 1983 was originally enacted as Section 1 of the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13, which applied only to action taken under the color of the law of any "State." The phrase "or Territory" was added without explanation in the 1874 codification and revision of the Statutes at Large, Rev. Stat. § 1979 (1874). *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 582 (1976); *District of Columbia* v. *Carter*, 409 U.S. 418, 424-425 n.11 (1973); pp. 7-8 note 6, *supra*. Given the background of territorial sovereign immunity against which the 1874 amendment was adopted, that fact is as significant here as it was in *Will*, 109 S. Ct. at 2310, where the Court found no evidence in the legislative history of the 1871 Act that Congress intended to treat the States as "person[s]." See also *Quern* v. *Jordan*, 440 U.S. 332, 341-343 (1979) (noting that the legislative history of the 1871 Act does not indicate an intent to abrogate the States' Eleventh Amendment immunity).

The historical background of Section 1983 is also instructive. Both the 1871 Civil Rights Act and the 1874 amendment were enacted during the turbulent period of Reconstruction. In 1866, the Ku Klux Klan began a campaign of murder and assault against the newly freed slaves and Union sympathizers, and became

virtually a shadow government in the Southern States. Because of the inability or refusal of Southern governments to enforce their laws against the Klan's predatory actions, the 1871 Civil Rights Act sought to enlist the federal courts in the protection of federal rights. *Carter*, 409 U.S. at 425-429; *Monroe* v. *Pape*, 365 U.S. 167, 172-180 (1961). But, as *Will* and *Quern* held, Congress did not include in the remedy provided by that Act an action for damages against the States for the unlawful conduct of their officers. And when in 1874 that remedy was extended to complaints of actions under color of territorial law, Congress sought to accomplish the same purposes as those underlying the 1871 Act. See *Examining Board*, 426 U.S. at 582-583; *Carter*, 409 U.S. at 429-431. In these circumstances, it would have been anomalous for a Reconstruction Congress to have intended to render the federal Territories financially liable when the States (including, of course, the Southern States) were not.[12]

5. Congress has legislated for the Territory of Guam with sovereign immunity principles in mind. The Organic Act of Guam, enacted by Congress in 1950, did not expressly authorize suit against the government of Guam, nor did it empower Guam to waive its sovereign immunity.[13] The failure to include such a provision in the Organic Act, Congress believed, made it "doubtful * * * whether the Legislature of Guam could authorize such

[12] That anomaly is underscored by the fact that the status of the Territories Congress had in mind when it passed these 1871 and 1874 laws has been described as one of "'pupilage'" because "[f]rom the moment of their creation, the Territories were destined for admission as States into the Union," *Carter*, 409 U.S. at 431 (quoting *Nelson* v. *United States*, 30 F. 112, 115 (D. Ore. 1887)).

[13] Section 3 of the Organic Act of Guam originally provided that "[t]he government of Guam shall have the powers set forth in this chapter and shall have power to sue by such name." 64 Stat. 384, 48 U.S.C. 1421a (1958). The Organic Act did not also provide that the government of Guam could itself be sued.

suits to be brought." H.R. Rep. No. 214, 86th Cong., 1st Sess. 1 (1959); S. Rep. No. 969, 86th Cong., 1st Sess. 1 (1959). To remedy this situation, Congress in 1959 passed 48 U.S.C. 1421a to "permit the government of Guam, with the consent of its legislature, to be sued" in tort or contract with respect to the exercise by Guam of any of its lawful powers. H.R. Rep. No. 214, *supra*, at 1; S. Rep. No. 969, *supra*, at 1-2. As explained by the Assistant Secretary of the Interior in a letter incorporated in the House and Senate Reports accompanying the amendment, the amendment "enables the Legislature of Guam to waive *the sovereign immunity which was conferred upon the government of Guam by the Congress through enactment of the Guam Organic Act* when, in the legislature's opinion, the best interests of both the people and government of Guam would be served by allowing such an action to be brought." H.R. Rep. No. 214, *supra*, at 2 (emphasis added); S. Rep. No. 989, *supra*, at 2 (same). Interpreting these provisions and relying on this Court's decisions in *Kawananakoa* v. *Polyblank*, *supra*, and *Porto Rico* v. *Rosaly*, *supra*, the Ninth Circuit has held that Guam is entitled to invoke sovereign immunity. *Marx* v. *Guam*, 866 F.2d 295, 297-298 (1989); *Crain* v. *Guam*, 195 F.2d 414, 416 (1952). The 1959 measure therefore confirms Congress's understanding that Territories like Guam, and the government of Guam in particular, may rely on sovereign immunity to protect themselves from suit without their consent.[14]

6. Petitioners offer little or no historical evidence to rebut the conclusion that Congress did not intend to treat the Territories as "person[s]" under Section 1983. Instead, petitioners rely almost exclusively on *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658 (1978), which held that a municipality is a "person" under Sec-

[14] Neither the text of the 1959 amendment nor its legislative history specifically addresses the question whether Guam's sovereign immunity extends to claims of tortious conduct in violation of *federal* law. General principles of sovereign immunity, however, support the conclusion that it does. See pp. 26-27, *infra*.

tion 1983. Pet. Br. 9-15. *Monell* reasoned that the debates on the Ku Klux Klan Act of 1871, which revealed that "Members of Congress understood 'persons' to include municipal corporations," 436 U.S. at 686; see *id.* at 686-687, were consistent with the well-settled, contemporaneous principle that "corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis," *id.* at 687; see *id.* at 687-688. *Monell* also found support for its conclusion in another law passed two months before the 1871 Act—the Dictionary Act, Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431—which stated that "in all acts hereafter passed • • • the word 'person' [extends to] bodies politic and corporate." *Monell* reasoned that the Dictionary Act, which was intended to provide a "few general rules for the construction of statutes," Cong. Globe, 41st Cong., 3d Sess. 1474 (1871) (remarks of Rep. Poland), supported the conclusion that "the 'usual' understanding of the word 'person' would extend to municipal corporations," 436 U.S. at 688. See *id.* at 688-689 & nn.51 & 53.

The rationale of *Monell*, however, is not applicable to the situation of a Territory. By 1871, municipalities no longer retained the sovereign immunity they had previously shared with the States. *Will*, 109 S. Ct. at 2310 n.7. By contrast, the law in 1874 clearly recognized the sovereign immunity of the Territories, *Wisconsin* v. *Doty*, 1. Pin. at 407; *Beachy* v. *Lamkin*, 1 Idaho at 52; *Langford* v. *King*, 1 Mont. at 38, and continued to do so thereafter, *Kawananakoa* v. *Polyblank*, 205 U.S. at 353-354; *Porto Rico* v. *Rosaly*, 227 U.S. at 273; *Puerto Rico* v. *Shell Co.*, 302 U.S. at 262; *Bonet* v. *Yabucoa Sugar Co.*, 306 U.S. 505, 506 (1939). Moreover, the Dictionary Act definition of "person" is not relevant here: as Justice Brennan noted in his dissent in *Will*, 109 S. Ct. at 2317, in 1874, in the same revision and codification of federal law that included Territories within the scope of Section 1983, Congress repealed that definition.[15]

[15] In any event, the Dictionary Act definition is of no help to petitioners. *Will* concluded that the Dictionary Act definition of "person" did not include the States since in the nineteenth century the term "public corporation" was understood to refer to municipal corporations and their equivalent local government units (towns, cities, and counties), rather than to the States, which were sovereign entities. 109 S. Ct. at 2310-2311. That conclusion is applicable here, since in the nineteenth century a Territory was also deemed to be a sovereign entity even though it was subject to direct congressional regulation under the Territories Clause of the Constitution, Art. IV, § 3, Cl. 2. *Wisconsin* v. *Doty*, 1 Pin. at 407; *Langford* v. *King*, 1 Mont. at 38. See *Clinton* v. *Englebrecht*, 80 U.S. (13 Wall.) at 441; *Hornbuckle* v. *Toombs*, 85 U.S. (18 Wall.) at 655-656. See also *Kawananakoa* v. *Polyblank*, 205 U.S. at 353-354; *Porto Rico* v. *Rosaly*, 227 U.S. 273-274; *Puerto Rico* v. *Shell Co.*, 302 U.S. at 262. For this purpose, too, a Territory is more analogous to a State than to a municipality.

Relying on a passage taken from *Monell*, 436 U.S. at 701, petitioners maintain that a Territory must be deemed a "person" under Section 1983 in the absence of a "clear statement" to the contrary in the legislative history. Pet. Br. 14-15, 20.[16] That argument is wrong in several respects. *Monell* adopted no such test for deciding whether a governmental entity is subject to liability under Section 1983. Far from requiring a "clear statement" that municipalities were excluded from the term "person," *Monell* concluded that municipalities were subject to liability under Section 1983 only after finding *affirmative* evidence (in the legislative history of the 1871 Civil Rights Act, in the contemporary legal understanding of the term "person," and in the statutory construction guides contained in the Dictionary Act) that Congress specifically intended to subject municipalities to such liability. See 436 U.S. at 683-689. The passage from *Monell*, 436 U.S. at 700-701, on which petitioners rely, see Pet. Br. 14-15, appears only after the Court had found that municipalities were subject to the 1871 Act, and was written in connection with the question whether the Court's holding in

[16] Petitioners' quotation from *Monell* at pages 14-15 of their brief adds the phrase "(or Territories)" to this Court's discussion in *Monell*, 436 U.S. at 701. *Monell* did not refer to Territories.

Monroe v. *Pape*, *supra*, should be overruled. See 436 U.S. at 700-701.[17] Since the structure of Section 1983 equates the Territories with the States, and since in 1874 the Territories had the status of fledgling States, there is considerable justification for applying to the Territories the principle in *Will* that the States will not be subjected to financial liability in the absence of an affirmative showing of congressional intent to do so. And if that standard is applied here, petitioners cannot satisfy it. The fragments of legislative history they cite, Pet. Br. 11, 14, are from the 1871 Civil Rights Act, not the 1874 amendment, and even when read liberally do not suggest that a Territory is a "person." Beyond that, petitioners can only point to Congress's silence. But "Congress' silence is just that—silence," *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 686 (1987), and cannot serve as affirmative proof of an intent to render the Territories liable in damages.[18]

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[17] Indeed, the Court noted in the same paragraph that under even "the most stringent test" for overruling a statutory decision—that it "appear beyond doubt from the legislative history" that the decision was wrong—the overruling of *Monroe*'s holding that local governments are not persons "is clearly proper." 436 U.S. at 700.

[18] Petitioners also rely on the Third Circuit's decisions in *Ocasio* v. *Bryan*, 374 F.2d 11 (1967), and *Frett* v. *Government of the Virgin Islands*, 839 F.2d 968 (1988), both of which involved the Territory of the Virgin Islands. Neither decision, however, aids petitioners, and *Ocasio* in fact supports respondents. *Ocasio* was a Section 1983 action for damages against individual police officers, and the court held that the plaintiffs could sue the officers "in [their] private capacit[ies]" under Section 1983. 374 F.2d at 13. In so ruling, the court rejected the officers' contention that Section 1983 had been implicitly repealed by Section 2(b) of the Revised Organic Act of the Virgin Islands, ch. 558, 68 Stat. 497 (codified at 48 U.S.C. 1541(b)), which barred tort actions against the Virgin Islands government without its consent. 374 F.2d at 13-14. Thus, *Ocasio* distinguished between the officers as individuals and the Virgin Islands government.

The Third Circuit's later decision in *Frett* v. *Government of the Virgin Islands*, *supra*, did hold that the Territory of the Virgin Islands was a "person" under Section 1983, but the court assumed

* * * * *

For all these reasons, we believe the judgment below was correct: A Territory, like a State, is not a "person" under Section 1983. And if Guam is not a "person" for purposes of Section 1983, it follows that the respondent police officers cannot be sued for damages in their official capacity under that law. The Court held in *Will* that a suit against a state officer for damages in his official capacity is in effect a suit against the State itself, and that a plaintiff cannot circumvent congressional intent by the mere pleading device of suing a state officer instead of the State. 109 S. Ct. at 2311. As petitioners concede, Br. 50, that rationale is fully applicable to territorial officers. Accordingly, petitioners' Section 1983 damages claims against the respondent police officers in their official capacity must fall along with petitioners' claims against Guam itself.[19]

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in reaching its conclusion that, after *Monell*, a State *was* a "person" under that statute. 839 F.2d at 977. *Will*, of course, rendered that assumption incorrect.

Finally, petitioners rely on the Ninth Circuit's earlier decision in *Fleming* v. *Department of Public Safety*, *supra*. There, the Ninth Circuit, relying on *Monell* and *Quern*, held that the Commonwealth of the Northern Marianas is a "person" under Section 1983, for two reasons. First, the court concluded that "governmental entities are persons for purposes of section 1983, but * * * those entities protected by the eleventh amendment remain immune from suits brought in federal court without their consent." 837 F.2d at 406; see also *id.* at 406-407. Second, the court held that, even if a State were not a person under Section 1983, the Commonwealth of the Marianas is a person, "because the argument that a state is not a person is premised *exclusively* upon the fact that states enjoy eleventh amendment immunity." 837 F.2d at 407 n.7 (emphasis added), citing *Quern*, 440 U.S. at 343. *Will*, however, shows that both of those conclusions are in error. While the Court in *Will* drew on the Eleventh Amendment in concluding that a State is not a person for purposes of Section 1983, the Court did not in so ruling rely "exclusively" on the Eleventh Amendment. See pages 9-10 note 8, *supra*.

[19] At the same time, as the Ninth Circuit held, petitioners' Section 1983 damages claims against the respondent police officers in

B. Guam May Invoke Sovereign Immunity In An Action For Damages Even If It Is A "Person" Under Section 1983

Even if Guam is a "person" for purposes of Section 1983, the question would still remain, as Justice Brennan noted with respect to the States in his dissent in *Will*, 109 S. Ct. at 2320, whether and to what extent the defense of sovereign immunity may be invoked.[20] The courts below did not address that question, which raises various issues regarding the scope of Guam's sovereign immunity, the effect of Section 1983 on that immunity, and the interrelationship among Section 1983, the Guam Organic Act, 48 U.S.C. 1421a, and the law of Guam. Moreover, while the Ninth Circuit has ruled that Guam possesses sovereign immunity, *Marx* v. *Guam*, 866 F.2d at 297-298; *Crain* v. *Guam*, 195 F.2d at 416, those decisions did not squarely present the question whether Guam was immune from suit under *federal* law. The Court therefore may wish to leave that question for the courts below to resolve on remand. If the Court decides to address the question, however, we believe that Guam may invoke sovereign immunity from a damages action such as this.

1. A Territory should be entitled to invoke sovereign immunity on the basis of its sovereign status even if it is a "person" under Section 1983. This Court has consistently ruled that "the all-encompassing language of § 1983 * * * is not to be taken literally," *Briscoe* v. *LaHue*, 460 U.S. 325, 330 (1983), because the "members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordi-

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their *individual* capacities may go forward unless the officers are entitled to qualified immunity under *Harlow* v. *Fitzgerald*, *supra*. Pet. App. A44-A48. That issue is open on remand.

[20] The question would also arise if, on the Ninth Circuit's theory that Guam is but a "creature of the federal government," petitioners sought to base their action on the rationale of *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971).

nary tort litigation," and "likely intended" to preserve those principles "absent specific provisions to the contrary." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). The principle that Territories were immune from suit was not as well settled in 1874 as the rule that the federal and state governments could not be sued without their consent, but the reported cases had recognized the doctrine of territorial sovereign immunity; those cases were consistent with this Court's understanding of Congress's theory of territorial self-governance, *Clinton* v. *Englebrecht*, 80 U.S. (13 Wall.) at 441; and this Court readily endorsed the doctrine when the question was first addressed early in this century, *Kawananakoa* v. *Polyblank*, 205 U.S. at 353-354. The doctrine was therefore sufficiently incorporated in long-established sovereign immunity principles that Congress should not be presumed to have abrogated it in Section 1983.

Petitioners err in relying on *Owen* v. *City of Independence*, 445 U.S. 622 (1980). Pet. Br. 40-45. *Owen* held that a municipality cannot invoke the doctrine of qualified official immunity since local governments did not enjoy immunity from liability when Section 1983 became law. 445 U.S. at 638-650. The contrary is true in this case. *Owen* also reasoned that affording municipalities immunity would disserve the purposes of Section 1983. 445 U.S. at 650-656. The same cannot be said here, since recognizing territorial sovereign immunity would not undermine Section 1983 any more than does the exclusion of the States from the scope of liability. Indeed, in other areas as well, this Court has concluded that common-law unqualified official immunities were not eliminated by Section 1983. *Stump* v. *Sparkman*, 435 U.S. 349 (1978) (judicial immunity); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976) (prosecutorial immunity); *Tenney* v. *Brandhove*, 341 U.S. 367 (1951) (legislative immunity).

Moreover, if this Court were to hold that Guam is a "person" under Section 1983, that holding would not be

nullified, as petitioners suggest, Pet. Br. 43, by recognizing that Guam retains its sovereign immunity from suit. First, Section 1983 would be an available damages remedy in any case in which the Territory has waived its sovereign immunity. Second, Section 1983 would afford a remedy in damages whenever Congress has abrogated the Territory's immunity by some other law. And in all events, Section 1983 would allow a party to seek prospective relief against a territorial official. Cf. *Ex parte Young*, 209 U.S. 123, 159-160 (1908).

The issue whether Guam is entitled to sovereign immunity is not entirely a matter of federal common law.[21] Section 3 of the Organic Act of Guam, ch. 512, 64 Stat. 384, was enacted in 1950 when a Territory with a structure like Guam's enjoyed sovereign immunity. Section 3 empowered Guam to sue, but did not authorize suit against Guam, nor did it explicitly authorize Guam to waive its immunity, even though a State (and the federal government) could waive immunity from suit in federal court. See, *e.g.*, *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362, 391 (1894). To remedy that omission, Congress could have defined those situations in which Guam was subject to suit. But it chose instead, in the 1959 amendment to Section 3, 48 U.S.C. 1421a, to authorize the Guam

[21] Petitioners criticize several First Circuit decisions for stating that Puerto Rico is entitled to invoke the Eleventh Amendment. Pet. Br. 16, 27, 46-47. Although several recent decisions by that court rather loosely state that Puerto Rico is entitled to invoke the Eleventh Amendment, see, *e.g.*, *Echevarría-Gonzalez* v. *Gonzalez-Chapel*, 849 F.2d 24, 32 n.7 (1988), it would be more accurate to describe the First Circuit's cases as stating that "[t]he principles of the Eleventh Amendment * * * are fully applicable to the Commonwealth of Puerto Rico," *Ezratty* v. *Puerto Rico*, 648 F.2d 770, 776 n.7 (1981). That view is also consistent with older First Circuit cases, which spoke in general terms about sovereign immunity and relied on this Court's decision in *Porto Rico* v. *Rosaly*, *supra*. See, *e.g.*, *Cortes* v. *Puerto Rico*, 422 F. 2d 1308, cert. denied, 400 U.S. 837 (1970); *Pesagaricano* v. *Allen Corp.*, 267 F.2d 550, 554 (1959); *Veita* v. *Fortuna Estates*, 240 F. 256, 262 (1917).

legislature at its discretion to waive the Territory's immunity from suit. Exercising that discretion, the legislature of Guam has consented to be sued for some actions, but not for all.[22] Taken together, 48 U.S.C. 1421a and the implementing law of Guam define petitioners' right to sue the government of Guam for the claims alleged in their complaint.[23]

2. Although the text of Section 1421a does not limit Guam's immunity in terms of either the forum or the source of law on which the claim is based, petitioners argue that Guam is entitled to immunity (a) only in the courts of Guam and (b) only for claims brought under Guam law. Relying on *Nevada* v. *Hall*, 440 U.S. 410 (1979), and *Kawananakoa* v. *Polyblank*, 205 U.S. at 353-354, petitioners submit that a sovereign (here, Guam) cannot invoke immunity in the courts of another sovereign (here, the United States) for relief sought under the other sovereign's law. Pet. Br. 34-36. This argument is not persuasive.

a. It is immaterial whether Guam is sued in the federal district court of Guam or in a Guam "local" court. To the extent that a Territory can be analogized to a State, the appropriate parallel is to a lawsuit by a private party against a State in federal court, which would be barred absent the State's consent, *Hans* v. *Louisiana*, 134 U.S. 1 (1890). Moreover, it is somewhat artificial to regard a federal court as the court of a separate sovereign, since Guam enjoys only the sovereignty granted to it by the United States. In any event, the Organic Act of Guam contemplated two judicial systems. It created a

[22] See Guam Gov't Code § 6500.01 (1970); *Munoz* v. *Government of Guam*, 625 F.2d 257 (9th Cir. 1980).

[23] The provision in Section 1421a that Guam may consent to suits in contract or tort relating to "the exercise by the government of Guam of any of its lawful powers" appears to authorize consent, *inter alia*, to suit for torts committed by persons acting under color of Guam law.

district court with the same jurisdiction as a district court of the United States and with jurisdiction over actions arising under the law of Guam, and it empowered Guam to established its own separate judicial system. § 22, 64 Stat. 389-390. The Organic Act did not distinguish between the immunity Guam possessed in each of those systems, nor did Congress draw that distinction nine years later when it passed 48 U.S.C. 1421a. That act applies equally to both.

That one sovereign may claim immunity in the courts of another, even when the sovereigns are wholly unrelated, is fully consistent with accepted principles. Thus, until recently, foreign nations were "generally granted * * * complete immunity from suit" in United States courts. *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). Such immunity—of one sovereign in the courts of another—is a "matter of comity" and not of absolute right. *Nevada* v. *Hall*, 440 U.S. at 416. Congress may therefore restrict the scope of the immunity of foreign nations, and in 1976 the State Department view —that foreign nations may claim immunity in American courts for public acts but not for commercial acts—was "[f]or the most part" codified in the Foreign Sovereign Immunities Act, 28 U.S.C. 1330, 1601-1611. *Verlinden*, 461 U.S. at 488.

b. There is similarly no reason to exclude cases arising under federal law—statutory or constitutional—from the scope of Section 1421a. Again, in view of federal authority over the Territories, the federal government cannot be regarded as a wholly separate sovereign power. But even to the extent that the two sovereigns are distinct entities, sovereign immunity principles do not suggest the exclusion of federal claims from the broad language of Guam's Organic Act. The recognition of the complete immunity of foreign nations referred to above was not limited to claims based on the law of the nation being sued. See *The Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 118 (1812); *Berizzi Bros.* v. *S.S. Pesaro*, 271 U.S. 562 (1926); *Verlinden*, 461 U.S. at 486. Although, as noted, such recognition is a matter of comity rather than constitutional compulsion, see *ibid.*, Congress has chosen to restrict it only in certain specified instances. See 28 U.S.C. 1330, 1602-1611. And in an analogous context, it is established that principles of sovereign immunity underlying the Eleventh Amendment entitle a State to immunity in a federal court action on a federal claim. See, *e.g.*, *Hans* v. *Louisiana*, *supra*; *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

Thus, it is not surprising that in cases involving other Territories, lower courts have held that, in the absence of a waiver, sovereign immunity extends to actions under Section 1983. *E.g.*, *Fernandez* v. *Chardon*, 681 F.2d 42, 59 (1st Cir.) (Puerto Rico can invoke sovereign immunity in an action under Section 1983), cert. denied, 459 U.S. 989 (1982); *Echevarria-Gonzalez* v. *Gonzalez-Chapel*, 849 F.2d 24, 32 n.7 (1st Cir. 1988) (same). Cf. *Fleming* v. *Department of Public Safety*, 837 F.2d 401, 407-408 (9th Cir.) (any sovereign immunity that the Marianas may enjoy from an action under Section 1983 had been waived), cert. denied, 109 S. Ct. 222 (1988); *Ezratty* v. *Puerto Rico*, 648 F.2d 770, 776 (1st Cir. 1981). But cf. *Frett* v. *Government of the Virgin Islands*, 839 F.2d 968, 976-977 (3d Cir. 1988) (the Virgin Islands government can be sued under Section 1983). Similarly in the present case, the question under Guam's Organic Act must be whether and to what extent Guam has consented to suit.

3. Petitioners maintain that Congress could not have intended to permit Guam to invoke sovereign immunity in an action under Section 1983 because Congress extended to Guam various constitutional guarantees that would be substantially depreciated unless such an action would lie against Guam itself. Pet. Br. 37-38. Their claim, however, overstates the significance of the immunity provided by 48 U.S.C. 1421a. That law allows Guam to invoke sovereign immunity in a damages action brought against

it. But a plaintiff remains free under Section 1983 to bring a damages action against an officer of Guam in his personal capacity, and to seek prospective relief against such an officer. These distinctions are well settled in sovereign immunity law, and would have been known to the Congress that passed 48 U.S.C. 1421a in 1959. See *Ex parte Young*, 209 U.S. at 159-160; *United States* v. *Lee*, 106 U.S. 196, 219-222 (1882). Thus, our interpretation of 48 U.S.C. 1421a no more nullifies Section 1983 than does this Court's decision in *Will*. On the contrary, so interpreting Section 1983 and 48 U.S.C. 1421a gives effect to each statute. See *Ocasio* v. *Bryan*, 374 F.2d 11, 13-14 (3d Cir. 1967).

4. If Guam may claim sovereign immunity in this action, that immunity may also be claimed on behalf of officers sued in their official capacity. As the district court held, any judgment against the officers in their official capacity "would expend itself on the public treasury." Pet. App. A6.

5. The final question—whether Guam has consented to this suit—requires application of Guam law to the allegations in petitioners' complaint.[24] That question of local law was considered by the district court, which held that Guam had not consented to suit under Section 1983, but the issue was not reached by the court of appeals. Accordingly, if this Court finds it necessary to answer the question, the court below should be given an opportunity to resolve it.

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[24] Section 6500.01 of the Guam Government Code (1970) provides in part that "[t]he Government of Guam hereby waives immunity from liability, but only as hereinafter provided: * * * (b) for claims in tort, arising from the *negligent acts* of its employees, even though occurring in an activity in which private persons do not engage" (emphasis added). Interpreting this provision, the Ninth Circuit has ruled that "Guam has not waived its immunity with respect to intentional torts committed by its employees." *Munos* v. *Government of Guam*, 625 F.2d at 258.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 1989

APPENDIX

1. 42 U.S.C. 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2. Section 2 of the Organic Act of Guam, ch. 512, 64 Stat. 384 (codified at 48 U.S.C. 1421), provides as follows:

> The territory ceded to the United States in accordance with the provisions of the Treaty of Peace between the United States and Spain, signed at Paris, December 10, 1898, and proclaimed April 11, 1899, and known as the island of Guam in the Marianas Islands, shall continue to be known as Guam.

3. Section 3 of the Organic Act of Guam, ch. 512, 64 Stat. 384, as revised (codified at 48 U.S.C. 1421a), provides as follows:

> Guam is declared to be an unincorporated territory of the United States and the capital and seat of government thereof shall be located at the city of Agana, Guam. The government of Guam shall have the powers set forth in this chapter, shall have the power to sue by such name, and, with the consent of the legislature evidenced by enacted law, may be sued upon any contract entered into with respect to, or any

tort committed incident to, the exercise by the government of Guam of any of its lawful powers. The government of Guam shall consist of three branches, executive, legislative, and judicial, and its relations with the Federal Government in all matters not the program responsibility of another Federal department or agency, shall be under the general administrative supervision of the Secretary of the Interior.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1968

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
DEC 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1281

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALEX NGIRAINGAS, *et al.*,

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v.

FRANCISCO Q. SANCHEZ, *et al.*

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

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BRIEF OF AMICUS CURIAE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

STATEMENT OF AMICUS CURIAE

This brief *amicus curiae* is submitted pursuant to Rule 36.4 by the Commonwealth of the Northern Mariana Islands, sponsored by its Attorney General. *Amicus* supports the position of respondent Government of Guam.

INTRODUCTION: INTEREST OF AMICUS CURIAE

The specific issue in this case is whether, as a territory, Guam is a "person" subject to suit under 42

U.S.C. § 1983 ("§ 1983). The court below held that Guam is not a person. By affirming the decision below, this Court now has the opportunity to resolve the anomalous and inconsistent appellate decisions regarding whether the state-like political entities such as the Territory of Guam and the Commonwealth of the Northern Mariana Islands are persons under § 1983.

This Court's decision last Term in *Will v. Michigan Department of State Police*, ___ U.S.___, 109 S. Ct. 2304 (1989), resolved the conflicting decisions of the various circuits regarding whether a State is a "person" for purposes of § 1983 when it held that a State is not a person. The Court can now complete the analysis of which political entities are persons under § 1983 and remove the inconsistency surrounding the "personhood" of the territory of Guam and the Commonwealth of the Northern Mariana Islands (hereafter "CNMI" or "Commonwealth").

Amicus curiae, the CNMI, has a direct interest in the resolution of this issue, particularly due to the decision of the Ninth Circuit Court of Appeals in *Fleming v. Department of Public Safety*, 837 F.2d 401 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 222. In *Fleming*, the Ninth Circuit held that the CNMI is a person under § 1983. Both *Ngiraingas v. Sanchez*, 858 F.2d 1368 (9th Cir. 1988), and *Fleming* squarely involve the immunity of a territory and a commonwealth government, respectively, from suits for money damages brought under § 1983. The court's holding in *Fleming* is erroneous and inconsistent with both *Will* and its own subsequent decision in *Ngiraingas*. *Amicus curiae* requests this Court to affirm the lower court in this case, overrule *Fleming*, and in so doing rule that neither the Territory of Guam nor the Commonwealth of the Northern Mariana Islands is a person within the contemplation of § 1983.

SUMMARY OF ARGUMENT

This Court squarely held in *Will* that States are not persons for purposes of § 1983. ___ U.S. at ___, 109 S.Ct. at 2312. In light of this ruling it is clear that the holding in *Fleming* is incorrect. Based on § 502(a)(2) of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, reprinted as amended at 48 U.S.C.A. § 1681 (West 1987) ("Covenant"), federal laws such as § 1983 apply to the CNMI if they apply to Guam and to the several States, but only *as they apply to the several States*. Since § 1983 applies, if at all, to the CNMI *as it applies to the several States*, it necessarily follows that the CNMI cannot be deemed to be a person for purposes of application of § 1983.

Also, for the same reasons that this Court determined that a State is not a person under § 1983, the Territory of Guam and the CNMI are not persons for purposes of applying that law. The CNMI, as a self-governing Commonwealth, has even more sovereignty under the Covenant than does a territory. Accordingly, the doctrine of common law immunity has even greater application in a self-governing political entity such as the CNMI. Moreover, the CNMI has not waived its common law immunity. It would therefore be an anomalous result to affirm the Ninth Circuit opinion in *Ngiraingas* and find that Guam is not a person, and yet allow the CNMI to be considered a

person for purposes of § 1983 under the *Fleming* opinion. *Amicus curiae* respectfully requests this Court to affirm the lower court herein, and in so doing, to find that the CNMI also is not a person under § 1983 and overrule the erroneous decision of the Ninth Circuit in *Fleming*.

DISCUSSION

I. HISTORICAL BACKGROUND REGARDING THE COMMONWEALTH.

It is important to an appreciation of the unique political relationship between the Northern Mariana Islands and the United States to consider the historical context in which that relationship has evolved. Moreover, the anomaly of a result in which Guam is deemed not to be a person under § 1983 and the Commonwealth is deemed to be a person under the *Fleming* opinion, becomes apparent in light of that unique relationship established by the Covenant.

A. Historical relationship of the United States with respect to Guam and the CNMI.

Following their discovery by Magellan in 1521 and later conquest by Spain, the Northern Marianas and Guam were subjected to Spanish rule.[1] At the end of the Spanish-American War, Guam was ceded to the

[1] Historical detail is drawn from the following sources: Senate Report No. 94-596, U.S. Code Congressional and Administrative News 1976, pp. 449-5[illegible]; League of Nations-Official Journal, January-February 1921, pp. 87-88; I Hackworth, *Digest of International Law*, p. 125 (U.S. Government Printing Office, 1940); *United States v. Covington*, 782 F.2d 1052, 1055 (9th Cir. 1985); *Commonwealth of the Northern Mariana Island v. Atalig*, 723 F.2d 682, 684-85 (9th Cir. 1984); *Gale v. Andrus*, 643 F.2d 826, 828-30 (D.C. Cir. 1980).

United States, and became and remains a U.S. Territory. In contrast, the Northern Mariana Islands were sold by Spain to Germany in 1899, and remained under German control until seized by the Japanese Empire in 1914. In 1920, Japan's occupation was legitimatized by a League of Nations mandate. Japan then controlled the Northern Marianas until liberation by United States forces in 1944 after some of the bloodiest fighting of the war in the Pacific.

When the United Nations was formed, responsibility for the former Japanese Mandated Islands, including the Northern Marianas, was transferred to and assumed by the UN. Consistent with the United States' policy that it sought no lands by conquest as a result of World War Two and that it also sought to hasten the end of former colonial empires, the United States accepted responsibility from the UN as administering authority for the former Japanese Mandated Islands, to be known as the Trust Territory of the Pacific Islands ("TTPI"). The TTPI consisted of several island groups including the Northern Marianas. Guam remained a U.S. territory and was not part of the TTPI.

The United Nations Charter provisions governing U.S. responsibility toward the Northern Mariana Islands and the rest of the TTPI include the following:

> Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the ob-

> ligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:
>
> a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
>
> b. *to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions*, according to the particular circumstances of each territory and its peoples and their varying stages of advancement; . . .

Article 73, United Nations Charter, 59 Stat. 1081, 1048, T.S. No. 993 (1945), reprinted at I Commonwealth Code p. A-101 (emphasis added).

Consistent with the nature of the relationship and the trust accepted by the U.S., it has always been true that:

> [T]he Trust Territory [including the Northern Mariana Islands] is not a territory or possession, because technically *the United States is a trustee rather than a sovereign.*

People of Saipan v. United States Department of Interior, 502 F.2d 90, 95 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975) (emphasis added). The inherent sovereignty and right to self-government of the people of the Northern Mariana Islands, subjugated to the rule of Spain, Germany and Japan, was recognized and nurtured by the United States as trustee, awaiting full reemergence with adoption of the Covenant. The Northern Mariana Islands never became a possession of the U.S. like Guam.

B. The Covenant is the fundamental document outlining the present relationship between the United States and the Commonwealth.

To fulfill its obligations under the United Nations trust, the United States entered into negotiations with the people of the Northern Mariana Islands regarding their future political status. The result was the formation of a political union, the terms of which were set forth in the Covenant, signed by the representatives of the people of the NMI and the Personal Representative of the President of the United States on February 15, 1975.

The Marianas District Legislature subsequently approved the Covenant and the eligible voters of the Northern Mariana Islands approved it by a 78.8 per cent favorable vote. Thereafter, and as provided by the Covenant, by joint resolution the Covenant was approved by the United States Congress. P.L. 94-241 (90 Stat. 263), 94th Congress Joint Resolution No. 549.

The Covenant represents a reaffirmation and reemergence of the Northern Marianas' sovereignty. The CNMI is not and never has been a U.S. territory. Unlike Guam, its existence and political sovereignty are not creatures of the United States. *See* opinion below, 858 F.2d at 1371, fn.1 for a good summary of this distinction. The Covenant is the fulfillment of the "sacred trust" accepted under the United Nations

Charter by the United States and represents the unique understanding of two sovereigns. Indeed, the Preamble to the Covenant itself states:

> This Covenant will be mutually binding when it is approved by the United States, by the Mariana Islands District Legislature and by the people of the Northern Mariana Islands in a plebiscite, constituting on their part *a sovereign act of self-determination.*

Covenant, Preamble (emphasis added).

An analysis of the Covenant is the starting point leading to the necessary conclusion that the Ninth Circuit holding in *Fleming* must be overruled.

ARGUMENT

I. UNDER THE COVENANT, FEDERAL LAWS SUCH AS § 1983 MUST BE APPLIED TO THE COMMONWEALTH IN THE SAME MANNER AS THEY ARE APPLIED TO THE STATES; THEREFORE, THE COMMONWEALTH IS NOT A "PERSON" FOR PURPOSES OF § 1983.

As the fundamental document outlining the relationship between the United States and the CNMI, the Covenant controls whether and, if so, how federal laws will apply in the Commonwealth. Applicability of federal laws existing on the effective date of the Covenant and laws which Congress might adopt after that date received meticulous attention in the drafting of the Covenant. A comprehensive mechanism was agreed to and a "bright line test" established.

Clearly, § 1983 is a law long pre-dating the Covenant. Application of § 1983 is therefore to be tested

by the apparatus of Covenant § 502[2], providing as follows:

> (a) The following laws of the United States in existence on the effective date of this Section and subsequent amendments to such laws will apply to the Northern Mariana Islands, except as otherwise provided in this Covenant:
>
> (1) those laws which provide federal services and financial assistance programs and the federal banking laws as they apply to Guam; Section 228 of Title II and Title XVI of the Social Security Act as it applies to the several States; the Public Health Service Act as it applies to the Virgin Islands; and the Micronesian Claims Act as it applies to the Trust Territory of the Pacific Islands;
>
> (2) *those laws not described in paragraph (1) which are applicable to Guam and which are of general application to the several States as they are applicable to the several States*; and
>
> (3) Those laws not described in paragraphs (1) or (2) which are applicable to the Trust Territory of the Pacific Islands, but not their subsequent amendments unless specifically made applicable to the Northern Mariana Islands, as they apply to the Trust Territory of the Pacific Islands until termination of the

[2] Application of laws enacted after the effective date of the Covenant is determined under § 105, which is limited by § 103.

> Trusteeship Agreement, and will thereafter be inapplicable.

Covenant § 502(a) (emphasis added).

Covenant § 502(a)(2) controls whether and to what extent § 1983 applies in the CNMI. The test requires first the satisfaction of two conditions precedent to application of the federal law. The law must be: (1) applicable to Guam and (2) of general application to the several States. Upon the satisfaction of these two conditions, the laws under scrutiny "will apply to the Northern Mariana Islands . . . *as they are applicable to the several States*. . . ." Covenant § 502(a) and (a)(2) (emphasis added).

The phrase "applicable to Guam" in Covenant § 502 is used in the sense of "applicable within or with respect to the geographic area." *Section by Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands*, p. 49, (Marianas Political Status Commission, February 15, 1975) (hereafter, *Section by Section Analysis*).

For purposes of argument it is assumed that § 1983 applies *within* the geographic area of Guam and is of general application to the several States, so the initial conditions for application would be satisfied. The next and crucial step under Covenant § 502(a)(2) is application of the law to the CNMI "*as* [*§ 1983*] *is applicable to the several States*. . . ."[9]

[9] The meaning of "as" in this context can only be the commonly understood and accepted meaning of that word. The Dictionary "as" means: "to such a degree or extent; similarly; equally. . . ." *The Random House College Dictionary* 78 (rev. ed. 1980.)

> In this context, the *Section by Section Analysis* states:
>
> It is understood, for example, that laws providing for the extradition of persons from one state or territory to another state or territory, 18 U.S.C. § 3182, will be applicable with respect to the Northern Marianas *in the same manner and to the same extent* as they are applicable with respect to Guam or a state.

Section by Section Analysis, p. 50.

In *Will*, this Court held that States are not persons for purposes of § 1983. 109 S.Ct. at 2312. Therefore, § 1983 is applicable to the States only in the sense that the States themselves are not persons under that law. Since the Covenant mandates that the law apply to the CNMI in the same manner, the inescapable conclusion must be that the CNMI cannot be deemed a "person" under § 1983, and the contrary conclusion of *Fleming* must be overruled.

The Court need not reach the issue of whether the Eleventh Amendment applies in the CNMI to conclude that the CNMI is not a person. Nor need the Court decide whether common law immunity applies and whether the CNMI waived such immunity, all of which the *Fleming* court relied upon extensively. While the CNMI argues that both the Eleventh Amendment and common law immunity apply to the Commonwealth and that neither have been waived (see argument below), these issues are unnecessary to the conclusion that the Commonwealth is not a person under § 1983. Rather, this Court need only read the clear and precise language of the Covenant together with the decision in *Will* to overrule *Fleming* and hold that the CNMI cannot be treated as a person for purposes of § 1983.

II. APPLYING THE ANALYSIS IN *WILL*, NEITHER THE TERRITORY OF GUAM NOR THE CNMI IS A PERSON UNDER § 1983.

Several of this Court's decisions lead to the conclusion that neither a territory nor a commonwealth is a person under § 1983.[4] Having granted certiorari in this case, the Court has the opportunity to resolve the conflict between the decision below, which held that the Territory of Guam is not a person, and *Fleming*, which held that the Commonwealth is a person.

A. Like the States, the CNMI enjoys inherent sovereign immunity.

Territories and commonwealths are generally distinguishable from municipalities; thus, *Monell* does not resolve the issue of whether such political entities are persons. The legislative history analyzed in *Monell* and *Quern* however, supports the conclusion that territories and commonwealths are not persons under § 1983.

For example, as discussed in depth in *Quern*, and subsequently reaffirmed in *Will*, Congress did not intend to override existing or common law governmental immunities when it passed § 1983. *Will*, ___ U.S. at ___ , 109 S.Ct. at 2309-10; *Quern*, 440 U.S. at 343-345. In 1871 when the Civil Rights Act was enacted,

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[4] *See Will*, 109 S.Ct. at 2312 (States are not persons under § 1983); *Quern v. Jordan*, 440 U.S. 332, 341, 99 S.Ct. 1139, 1145, 39 L.Ed.2d 358 (1979) (States are immune from suit in federal court under § 1983); *Kawananakoa v. Polyblank*, 205 U.S. 349, 27 S.Ct. 526, 51 L.Ed. 834 (1907) (Territory is not like a suable municipality). *See also Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658, 689, 98 S.Ct. 2018, 2035, 56 L.Ed.2d 611 (1978) (Giving historical evidence of Congressional intent as to pre-§ 1983 immunities).

municipal governments and other local government bodies, unlike States, had no common law immunity and were generally subject to suit. Therefore, Congress intended that such bodies could be sued as persons under § 1983. *Monell*, 436 U.S. at 688-89. There was no need to indicate an intent to subject such bodies to suit since Congress understood at the time that the scope of § 1983 would encompass municipalities. *Will*, ___ U.S. at ___ , 109 S.Ct. at 2310, fn. 7; *Monell*, 436 U.S. at 688-9.

On the other hand, the Court in *Will* pointed out that at the time § 1983 was enacted, the States *did* enjoy common law sovereign immunity. ___ U.S. at ___ , 109 S.Ct. at 2309-10. Further, the Court found that Congress did not express any intent to abrogate this inherent immunity, and concluded that the term "person" did not include States. *Id.*

Territorial governments, like States and unlike municipalities, historically have always enjoyed common law sovereign immunity. This was the status of the law in 1871 when § 1983 was enacted. *See Kawananakoa v. Polyblank*, 205 U.S. 349, 27 S.Ct. 526, 51 L.Ed. 834 (1907). In *Kawananakoa*, the Court rejected the argument that the Territory of Hawaii was not sovereign and that it was equivalent to a suable municipality. 205 U.S. at 350. The Court concluded that the territory, like State governments and unlike municipalities, enjoyed common law sovereign immunity. *Id.* at 352-53. The cases relied upon by the Court in *Kawananakoa* were decided either prior to or contemporaneously with the 1871 Civil Rights Act, reflecting the law as it would have been understood by Congress at the time. *See Kawananakoa*, 205 U.S. at 353-54.

This principle has more recently been reaffirmed by the Ninth Circuit in *Marx v. Government of Guam*, 866 F.2d 294 (9th Cir. 1989) where the court noted:

> The Supreme Court and this court have recognized that territorial governments have a form of *inherent or common law sovereign immunity.*

Id. at 297 (emphasis added). The court went on to find that the Territory of Guam has "inherent sovereign immunity." *Id.* at 298.

Accordingly, based on *Quern*, *Monell* and *Will*, since Congress did not express any intent to abrogate the common law immunity enjoyed by Territories when it enacted § 1983, such immunity was not disturbed by the Act. More importantly, based on this immunity, Congress did not intend to include Territories within the definition of "person."

Since the Territory of Guam enjoys inherent common law immunity based on its autonomy and sovereign nature, clearly the CNMI, which enjoys greater autonomy and sovereignty under the Covenant than Guam or any territory under its Organic Act, also has common law immunity. Indeed, the CNMI has more of the sovereign attributes of a State than Guam, and a greater claim to sovereignty based on its history and unique political relationship with the U.S. as established under the Covenant. For example, the Commonwealth has the right of self-government as acknowledged in the Trusteeship Agreement and the Covenant. Covenant §§ 101, 103; *Commonwealth of the Northern Mariana Islands v. Atalig*, 723 F.2d 682, 687 (9th Cir. 1984). As the court noted in *Atalig*:

> Guam is subject to the plenary power of Congress and has no inherent right to govern itself. [Citation omitted.] *In contrast, the NMI possesses a right to self-government acknowledged in the Trusteeship Agreement and the Covenant.*

Id. (emphasis added). Note, significantly, the court's recognition that this right to self-government is acknowledged, not granted, by these agreements.

Moreover, the CNMI has its own immigration, naturalization and customs laws and is not subject to federal laws in the CNMI in these areas. Covenant §§ 503 and 603. The Commonwealth also is not bound by the federal minimum wage laws. Covenant § 503. Even States do not have such autonomy. Given all of these traits, clearly if the Territory of Guam enjoys inherent common law sovereign immunity, so too the unique entity of the Commonwealth possesses such immunity. The Commonwealth as well retains its inherent immunity under § 1983 because there is no clear Congressional intent to abrogate such immunity as was evident for municipalities and other local government bodies.

B. The Commonwealth has not waived its common law sovereign immunity.

The CNMI has not waived its inherent common law immunity and the *Fleming* court erred in implying such a waiver from the approval of the Covenant. The court in *Fleming* found that the Eleventh Amendment to the U.S. Constitution was not listed in § 501(a) of the Covenant, which is a list of federal Constitutional provisions that apply in the CNMI, and concluded that the Commonwealth had waived Elev-

enth Amendment immunity. The court then took a giant leap and *implied* a waiver of the CNMI's common law sovereign immunity due to the absence of the Eleventh Amendment in the Covenant. *Fleming*, 837 F.2d at 407.

The Commonwealth did not express an intent to waive its immunity, however. No waiver occurred by failing to include the Eleventh Amendment in the Covenant because, regardless of the Amendment, the Commonwealth has inherent sovereign immunity. *See Kawananakoa* and argument above. This inherent immunity was not impliedly waived. The "presumption" of waiver is unjustified when it is recognized that there is no indication that the subject was discussed. Furthermore, at the time of negotiating the Covenant, and even now, the only other U.S. commonwealth, and U.S. territories, enjoyed sovereign immunity. *See, e.g., Litton Industries, Inc. v. Colon*, 587 F.2d 70, 72 (1st Cir. 1978) (Puerto Rico); 48 U.S.C. § 1421a (Guam); 48 U.S.C. § 1541(b) (Virgin Islands). It is simply inconceivable that the drafters of the Covenant intended to waive the Commonwealth's sovereign immunity from a citizen's suit in federal court without even mentioning the subject. *Welch v. Texas Department of Highways and Public Transportation*, ___ U.S. ___, ___, 107 S.Ct. 2941, 2945-6, 97 L.Ed.2d 389 (1987); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99, 104 S.Ct. 900, 907, 79 L.Ed.2d 67 (1984); *United States v. Mitchell*, 445 U.S. 535, 538, 100 S.Ct. 1349, 1351, 63 L.Ed.2d 607 (1980) (Waiver of sovereign immunity cannot be implied but must be unequivocally expressed); *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S.Ct. 1347, 1360-61, 39 L.Ed.2d 662, 678 (1974). Far

more certainly, that immunity was understood and expected to continue, under the provisions of Covenant § 402(a) which defines the jurisdiction of the federal District Court of the Northern Mariana Islands.[5]

Courts have repeatedly noted in the context of a waiver of Eleventh Amendment immunity that waiver will be found "only where stated by the 'most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' " Welch, ___ U.S. at ___, 107 S.Ct. at 2946 (citations omitted). As stated recently by this Court:

> The test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one. . . . Thus, in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in *federal court*.

Atascadero State Hospital v. Scanlon, 473 U.S. 238, 241, 105 S.Ct. 3142, 3146, 87 L.Ed.2d 171 (1985).

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[5] The District Court for the Northern Mariana Islands will have the jurisdiction of a district court of the United States, except that in all causes arising under the Constitution, treaties or laws of the United States it will have jurisdiction regardless of the sum or value of the matter in controversy.

Covenant § 402(a). The *Section by Section Analysis* elaborates by noting that the district court "will have the same jurisdiction as a district court of the United States *in a state of the union*." *Section by Section Analysis*, p. 34 (emphasis added).

In *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*, 450 U.S. 147, 150, 101 S.Ct. 1032, 1034, 67 L.Ed.2d 132 (1981), the Court found no waiver of Eleventh Amendment immunity even where a State by statute made its health department a "body corporate," to "sue and be sued." Such general waiver of sovereign immunity did not waive Florida's immunity to suit against it in federal court.

The Commonwealth has not unequivocally expressed its intent to waive its immunity from suit in federal court. Quite the contrary. In the Covenant the people of the Commonwealth agreed to allow the district court to have the same jurisdiction it exercises in the several States. Covenant § 402. This jurisdiction is limited by the doctrine of inherent sovereign immunity as exemplified by the Eleventh Amendment. As noted in *Pennhurst*:

> [T]he principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Article III. . . . 'That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that *the entire judicial power granted by the Constitution does not embrace authority to entertai . a suit brought by private parties against a State without consent given.*'

465 U.S. at 98 (citations omitted) (emphasis in the original).

The doctrine of governmental immunity from suit has been linked with the Amendment's limitation on the federal judicial power. However, immunity exists for territories, *see Marx*, 866 F.2d at 294, and likewise for the CNMI *regardless* of the Eleventh Amendment. The Amendment is simply an exemplification of the fundamental doctrine of sovereign immunity. *Pennhurst*, 465 U.S. at 98.

III. The Court's Reasoning and Holding in *Fleming* are Not Valid Based on This Court's Holding in *Will*.

In *Fleming*, the Commonwealth was sued in the federal District Court for the Northern Mariana Islands. Plaintiff Fleming, asserting a claim under § 1983, alleged that the CNMI Department of Public Safety had deprived him of equal protection and property rights without due process of law. After the court denied the CNMI's motion to dismiss, the jury returned a verdict in Fleming's favor.

The court of appeals found that the Commonwealth is a person under § 1983 based on its conclusion that all governmental entities, including States, are persons. *Fleming*, 837 F.2d at 406-7. The court further reasoned that although States are persons, they are immune from suit under the Eleventh Amendment. *Id.* The court ruled that the Eleventh Amendment did not apply to the Commonwealth because it is not enumerated in Covenant § 501. From that conclusion, the court reasoned that the CNMI impliedly waived its common law sovereign immunity by entering into the Covenant without expressly including the Eleventh Amendment in the agreement. *Fleming*, 837 F.2d at 407-8. Having resolved these jurisdictional issues, the court then set aside the damages award, finding that Fleming had proved no cognizable injury. *Id.* at

408-9. The CNMI petitioned this Court for a Writ of Certiorari which was denied.

Based on this Court's holding in *Will*, it is clear that the opinion in *Fleming* is insupportable. First, in concluding that the CNMI is a person under § 1983, the *Fleming* court relied heavily on its finding that all governmental entities, including States, are persons under § 1983. This premise, which was the basis of the court's holding, is demolished by *Will*. 109 S.Ct. at 2312. Second, the court erroneously asserted that even if States are not persons, the basis for such a conclusion relies exclusively on the existence of the States' Eleventh Amendment immunity. *Fleming*, 837 F.2d at 407, fn. 7. In *Will*, the validity of this assumption is dispelled. 109 S.Ct. at 2309. The court in *Will* noted that the scope of the Eleventh Amendment and the scope of § 1983 are separate issues. The Court stated:

> *This does not mean, as petitioner suggests, that we think that the scope of the Eleventh Amendment and the scope of § 1983 are not separate issues. Certainly they are.* But in deciphering congressional intent as to the scope of § 1983, the scope of the Eleventh Amendment is a consideration, and we decline to adopt a reading of § 1983 that disregards it.

Id. (emphasis added).

The United States Solicitor General, in his Brief for the United States as *amicus curiae*, asked this Court to deny the petitioner's request for a writ of certiorari. The Solicitor General implies that the decision below and *Fleming* are inconsistent, but then

asserts that no conflict exists because the *Fleming* decision no longer has any binding effect in light of *Will*. Brief for the United States as *Amicus Curiae* on Petition for Writ of Certiorari at 15-16. *Amicus curiae* focused on the court's findings (1) that States are persons, and (2) that the countervailing argument that States are not persons is based solely on the existence of the Eleventh Amendment. The Solicitor General noted:

> [T]here is no present conflict between the decision below and the Ninth Circuit's earlier decision in *Fleming* [remainder of citation omitted]. . . . This Court's subsequent decision in *Will*, however, shows that both of [the conclusions made by the court in *Fleming*] are *in error*. Thus, the Ninth Circuit may well reconsider its reasoning in *Fleming* in light of this Court's decision in *Will*.

Id. (emphasis added).

Accordingly, because the assumptions which formed the basis of the decision in *Fleming* were incorrect, this Court should overrule *Fleming* and thereby remove the inconsistency between that decision and this Court's decision in *Will*.

CONCLUSION

The issues presented by this case are of great moment, certainly to the people of the Territory of Guam and the Commonwealth of the Northern Mariana Islands, but also to the people of all the political entities comprising the "American Political Family." The status of these entities should not be trivialized to that of mere villages or counties but should be recognized

as partaking of a "State-like" nature with respect to § 1983. Like States, territories and commonwealths should not be deemed "persons" under that law.

This result is consistent with the historical background of § 1983 and with an increasing recognition of the right of the peoples of territories and commonwealths to self-government.

The Commonwealth of the Northern Mariana Islands respectfully requests this Court to affirm the decision below, and rule that, like the States, neither the Territory of Guam nor the CNMI is a person under § 1983. *Amicus* further requests the Court to overrule the Ninth Circuit's decision in *Fleming*.

Respectfully submitted this 20th day of December, 1989.

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AMICUS CURIAE

BRIEF

No. 88-1281

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALEX NGIRAINGAS, OSCAR ONGKLUNGEL, JIMMY MOSES, ARTHUR MECHOL, JONAS NGEHEED and BOLANDIS NGIRAINGAS,

Petitioners,

v.

FRANCISCO Q. SANCHEZ, individually and as a Police Officer, JOSEPH R. CRUZ, individually and as a Police Officer, JOSE T. TERLAJE, individually and as a Police Officer, JOE P. BALAJADIA, individually and as a Police Officer, ELMER F. SARDOMA, individually and as a Police Officer, JOSEPH A. SAN NICOLAS, individually and as a Police Officer, JUDITH P. GUTHERTZ, in her Official Capacity as Director of the Department of Public Safety (Guam Police Department), THE GUAM POLICE DEPARTMENT and THE GOVERNMENT OF GUAM,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE GOVERNMENT OF THE VIRGIN ISLANDS, EX REL. GODFREY R. de CASTRO, ATTORNEY GENERAL OF THE VIRGIN ISLANDS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1281

ALEX NGIRAINGAS, OSCAR ONGKLUNGEL, JIMMY MOSES, ARTHUR MECHOL, JONAS NGEHEED and BOLANDIS NGIRAINGAS,

Petitioners,

v.

FRANCISCO Q. SANCHEZ, individually and as a Police Officer, JOSEPH R. CRUZ, individually and as a Police Officer, JOSE T. TERLAJE, individually and as a Police Officer, JOE P. BALAJADIA, individually and as a Police Officer, ELMER F. SARDOMA, individually and as a Police Officer, JOSEPH A. SAN NICOLAS, individually and as a Police Officer, JUDITH P. GUTHERTZ, in her Official Capacity as Director of the Department of Public Safety (Guam Police Department), THE GUAM POLICE DEPARTMENT and THE GOVERNMENT OF GUAM,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE GOVERNMENT OF THE VIRGIN ISLANDS, EX REL. GODFREY R. de CASTRO, ATTORNEY GENERAL OF THE VIRGIN ISLANDS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE GOVERNMENT OF THE VIRGIN ISLANDS

Amicus respectfully files this brief in support of the Brief on the Merits filed on behalf of Respondents by the Government of Guam. This brief is filed pursuant to Supreme Court Rule 36.4 and presented for the United States Virgin Islands ("Virgin Islands"), sponsored by Godfrey R. de Castro, Attorney General of the Virgin Islands.

The Virgin Islands is an unincorporated territory of the United States. 48 U.S.C. § 1541(a). The Virgin Islands is governed by the Revised Organic Act of 1954, Pub. L. No. 83-517, Ch. 558, 68 Stat. 497, 48 U.S.C. § 1541 *et seq.* (1982 and Supp. III 1985). The Virgin Islands has only such powers as may be granted to it by the Congress of the United States. Citizens of the Virgin Islands do not have the full protection of the Constitution and only fundamental Constitutional rights, as found in the Bill of Rights, apply to them absent a specific Congressional grant. The Virgin Islands has the power to enact laws for the protection of life, the public health and the public safety. 48 U.S.C. § 1561. Under the Revised Organic Act, the Virgin Islands is immune from suit unless consent is granted. The Virgin Islands enacted a Tort Claims Act which waives its immunity from suit in tort, to the extent allowed in the statute.

The Government of the Virgin Islands and its various agencies have a fundamental interest in preserving immunity from suits alleged under the Civil Rights Act, 42 U.S.C. § 1983. The territories of Guam and the Virgin Islands are similar by virtue of their unincorporated status to the United States. An Organic Act governs each respective territory and subjects it to the control of Congress. A decision by this Court that Guam is a "person" for purposes of suit under 42 U.S.C. § 1983, would have a direct impact on the Virgin Islands.

SUMMARY OF ARGUMENT

The unincorporated territory of Guam is not a "person" for the purposes of 42 U.S.C. § 1983.

The status of an unincorporated territory is uniquely different from that of an incorporated territory, state or municipality. Accordingly, distinctions must be made between each form of government when determining the application of the Civil Rights Act.

The unincorporated territory is governed by an Organic Act, which limits the parameters of its authority. Pursuant to the Act, the unincorporated territory is subject to the plenary control of the Congres and is fully accountable to it. As such, the unincorporated territory is not a sovereign body politic, separate and apart from the federal government.

The unincorporated territory is an extension of the federal government, exercising only such powers and protected only by such laws as Congress may prescribe. Thus, in 1959, Congress amended the Organic Act of Guam to remove Guam's absolute immunity from suit, and allow the filing of tort suits against the government with government approval. Consequently, only such actions as are allowed pursuant to this Amendment may be brought against the Government of Guam. Congress did not allow for anything more, and this limited waiver of immunity should not be extended.

The unique relationship between the federal government and its unincorporated territories compels the extension to such entities the same level of immunity attained by the federal government, thus placing them outside the meaning of "person" under 42 U.S.C. § 1983.

ARGUMENT

I. AN UNINCORPORATED TERRITORY IS NOT A "PERSON" AS IT IS APPLIED IN CIVIL RIGHTS CASES FILED UNDER 42 U.S.C. § 1983.

A. The Unincorporated Territory Is Governed By An Organic Act And Subject To The Control Of Congress, And Is, Therefore, Not A Sovereign Body Politic, Independent And Separate From The Federal Government.

The Civil Rights Acts were promulgated to protect those individuals who were denied their fundamental rights as provided in the Constitution. Congress enacted the Civil Rights Act of 1871, now codified as 42 U.S.C. § 1983 to enforce these rights. It now reads, in pertinent part that:

> Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (Emphasis added)

"Person", as referred to in 42 U.S.C. § 1983, constitutes a class of entities and/or individuals that would not come under direct Congressional control to protect these fundamental rights. Courts, however, have differed in their interpretation of "person" and which entity would be subject to the direct supervision of the federal government via 42 U.S.C. § 1983.

By design, Congress obligated Guam to report to and maintain a close relationship with it when it enacted the Guam Organic Act, 48 U.S.C. § 1421, *et seq.* The Ninth Circuit recognized the aforementioned relationship in the *People of the Territory of Guam v. Okada*, 694 F.2d 565, 568 (9th Cir. 1982), *cert. den.*, 469 U.S. 1021, when it held that:

> "Guam as an unincorporated territory is subject to [Congress'] plenary power. Congress has the power to legislate directly for Guam, or to establish a government for Guam subject to Congressional control."

The Government of Guam does not have the ability to enact any law that goes beyond the intent of Congress. Accordingly, the ". . . Government of Guam has no inherent right to govern itself." *Id.* at 568, and the provisions of the Organic Act set the outer limits of the Guam Legislature's authority.

The measure of sovereign immunity provided for in the Organic Act of Guam was altered in 1959 when Congress amended the Act, limiting such sovereign immunity for tort and contract actions. This Amendment allows for such suits with the consent of Guam's Legislature.[1] Although Congress authorized this limitation to immunity in the Organic Act, Congress did not provide an exception in the Organic Act for Civil Rights cases. Therefore, Congress did not intend Guam to be considered a "person" as set forth in 42 U.S.C. § 1983.

The Ninth Circuit in *Fleming v. Department of Public Safety*, 837 F.2d 401 (9th Cir. 1988), *cert. den.*, 109 S. Ct. 222, recognized the need to view territories separately for purposes of applying Section 1983. The Circuit Court held that ". . . territories are *sui generis*. Each one must be viewed independently to determine the rights granted to its citizenry, the rights reserved to itself, and those possessed by the federal government." *Id.* at 404.

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[1] Report of the Commission on the Application of Federal Laws to Guam, H.R. No. 212, 82d Cong. 1st Sess. 1 (1951) (a) permit Government of Guam, with the consent of Legislature, to be sued in tort or contract. House Report at 1, Senate Report at 1-2.

The Insular Cases[2], provide an extensive study of the territories acquired by the United States and the application of the Constitution to each respective territory.[3] Since the doctrine of "territorial incorporation" was first enunciated in the Insular Cases, it has been settled Constitutional law that "the entire Constitution does not extend of its own force to unincorporated areas". *Torres v. Commonwealth of P.R.*, 442 U.S. 465, 469-70 (1979). This Court, in resolving questions of the Constitution's applicability to unincorporated territories, has concluded that only certain fundamental personal rights declared in the Constitution apply to unincorporated territories without explicit adoption by Congress. *Examining Board of Engineers, v. Flores de Otero*, 426 U.S. 572, 599-600 n.30, (1976).

The Organic Acts governing the unincorporated territories of Guam and the Virgin Islands protect fundamental constitutional rights of individuals. Any exceptions or additional protections enacted by the territorial legislature are subject to Congressional approval. Accordingly, in *Torres v. Commonwealth of P.R.*, supra, the Court opined that

> ". . . because the limitation on the application of the Constitution in unincorporated territories is based in part on the need to preserve Congress' ability to govern such possessions, and may be overruled by Congress, a legislative determination . . . is entitled to great weight." *Id.* at 470.

The legislative determination in the instant case is the limited wavier of immunity from suit which does not

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[2] E.g. *Balzac v. Porto Rico*, 258 U.S. 292 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Downes v. Bidwell*, 182 U.S. 244 (1901).

[3] See generally Coudert, *"The Evolution of the Doctrine of Territorial Incorporation"*, 26 Column. L. Rev. 823 (1923).

encompass subjecting the unincorporated territory of Guam to suit under 42 U.S.C. § 1983.

B. The Unique Status Of An Unincorporated Territory Distinguishes It From A Municipality, Which Has Been Found To Be A "Person" Under 42 U.S.C. § 1983.

Prior to 1978, local governments could not be sued under 42 U.S.C. § 1983. This Court overruled *Monroe v. Pape*, 365 U.S. 167 (1961), insofar as it held that local governments are wholly immune from suit under Section 1983, and held that municipalities were "persons", and that local governments were intended to be included among the "persons" to which Section 1983 applies. *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658, (1978). A state differs from both a territory and municipality because of a its sovereign immunity under the 11th Amendment. Recently, this Court declared that a state is not a "person" within the purview of Section 1983. *Will v. Michigan Dept. of State Police*, —— U.S. —— 109 S.Ct. 2304 (1989). The 11th Amendment applies only to states, and may not be invoked by the unincorporated territories. See *Tonder v. The M/V Burkholder*, 639 F. Supp. 691 (D.V.I. 1986); *Dennis v. College of the Virgin Islands*, 398 F. Supp. 1317 (D.V.I. 1975).

Eleventh Amendment immunity has been granted to the Commonwealth of Puerto Rico because of its status as an incorporated territory intended for statehood. The Court in *Ezratty v. Commonwealth of Puerto Rico*, 648 F.2d 770, 776 n. 7 (1st Cir. 1981), held that "the principles of the 11th Amendment, which protect a state from suit without its consent, are fully applicable to the Commonwealth of Puerto Rico."

It is generally accepted and, indeed is settled law, that corporations are "persons," albeit artificial, and may be treated the same as any natural person who is a citizen

of a state. *Monell, supra*, quoting from *Louisville R. Co. v. Letson*, 2 How. 497 (1844).

Municipalities are municipal corporations, and are bodies politic and corporate. In order to exist, they must be properly chartered by the sovereign (e.g. state). The enactment of the charter confers on the municipality the powers of the state for local administration of the affairs of the state and for local government or administration of matters peculiar to it.

The unincorporated territory, by contrast, is not chartered. It exists at the behest of the Congress. By a simple vote of the Congress, the Organic Act under which the unincorporated territory exists may be repealed and the limited self government which it enjoys nullified.[4]

Unlike the municipal corporation's administration of state laws, the unincorporated territory cannot administer any laws of the Federal Government. And, unlike many municipal corporations, e.g. the Department of Social Services in *Monell*, the governments of the unincorporated territories must perform many functions; they do not exist for one unique purpose. Indeed, the government of the unincorporated territory functions very much like that of a state, which it is not.

C. An Unincorporated Territory Is An Extension Of The Federal Government And Therefore Is Not A 'Person' Under 42 U.S.C. § 1983.

The unincorporated territory of Guam is a mere extension of the federal government. The Ninth Circuit, in *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285 (9th Cir. 1985), *cert. den.*, 475 U.S. 1081 (1986), observed that "since Guam is an unincorporated territory enjoying only such powers as may be delegated to it by Congress in the Organic Act of Guam, 48 U.S.C. § 142a, the Government of Guam is in essence an instrumentality of the federal government." *Id.* at 1286.

[4] It should be remembered that many of the territories only recently received the right to exercise any measure of self government. In the Virgin Islands, for example, the citizens could not elect their own Governor until 1970. Prior to that, the Governor was appointed by the Federal Government.

The territory is not acting independent of the federal government by the enactment of territorial laws. In *United States v. Wheeler*, 435 U.S. 313, 321 (1941), this Court held that "when a territorial government enacts and enforces . . . laws to govern its inhabitants, it is not acting as an independent political community like a state, but as "an agency of the federal government", quoting *Domenech v. National City Bank*, 294 U.S. 199 (1935). The *Wheeler* Court continued further that, "thus, in a federal territory and the Nation, as in a city and a state, "(t)here is but one system of government, or of laws operating within (its) limits," quoting *Benner v. Porter*, 9 How. 235, 321, 13 L.Ed. 119 (1850), and concluded that "city and state, or territory and nation, are not two separate sovereigns to whom the citizens owe separate allegiance in any meaningful sense, but one alone." *Wheeler, supra* at 321.

Therefore, since the federal government enjoys immunity from the application of the Civil Rights Act and exercises plenary control over Guam, so too should the unincorporated territory be immune from application of 42 U.S.C. § 1983. "There is no reason why Guam should enjoy less immunity than the federal government itself." *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d at 1289.

II. AN UNINCORPORATED TERRITORY CANNOT BE SUED UNDER § 1983, BUT MAY BE SUED FOR CLAIMS SOUNDING IN TORT WITH ITS CONSENT.

In *Ocasio v. Bryan*, 374 F.2d 11 (3rd Cir. 1967), the Third Circuit decided that the applicability of 42 U.S.C. § 1983 to suits against the Government of the Virgin Islands was too tenuously indicated to be of any serious merit. The Court stated that "(w)e need not consider the merits of so attenuated an indication of legislative intention. . ." *Id.* at 43.

The unincorporated territories have enacted legislation that provides equivalent protection for actions sounding in tort which reach the same breadth of the Civil Rights Act. This Court, in *Monroe v. Pape*, *supra* at 187, held that suits under Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."

In 1971, the Virgin Islands Legislature took the initiative to enact the Virgin Islands Tort Claims Act, 33 Virgin Islands Code, Section 3408, *et seq.* It states in pertinent part that:

> ". . . the Government of the Virgin Islands hereby waives its immunity from liability and action and hereby assumes liability . . . caused by the negligent or wrongful act or omission of an employee of the Government of the Virgin Islands while acting within the scope of his office or employment, under circumstances where the Government of Virgin Islands, if a private person, would be liable to the claimant. . . . The Government consents to have the liability . . . as applied to actions in the courts of the Virgin Islands against individuals or corporations; . . ." 33 V.I.C. § 3408.

Both the 1959 Amendment to the Guam Organic Act and the Virgin Islands Tort Claims Act provide a means to redress violations of fundamental rights of individuals

that arise out of tort. In *Davis v. Knud-Hansen Memorial Hospital, et al.*, 635 F.2d 179, 185 (3rd Cir. 1980), the Third Circuit acknowledged that "there is no doubt that suits brought under 42 U.S.C. § 1983 resemble tort suits for many purposes."

CONCLUSION

The unincorporated territory of Guam is not a "person" under the purview of 42 U.S.C. § 1983.

The Government of Guam functions under the plenary power of the United States Congress. Guam is not an autonomous body politic but rather an extension of the federal government. Guam should therefore be granted that immunity from suit which attaches to every other extension of the federal government.

The decision of the Ninth Circuit that Guam is not a "person" for purposes of suit under 42 U.S.C. § 1983 should be upheld.

Respectfully submitted,

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